SUPREME COURT OF THE UNITED STATES.

No. 118.

E. I. DUPONT DE NEMOURS & CO., LIBELLANTS AND APPELLANTS,

v.

JOHN VANCE AND AL., CLAIMANTS OF THE BRIG "ANN ELIZABETH."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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United States of America, Eastern District of the State of Louisiana.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG "ANN ELIZABETH," &c., JOHN VANCE and others, claimants.
No. 2390.

Pleas and proceedings before the Honorable the Circuit Court of the United States, in and for the Fifth Judicial Circuit and Eastern District of the State of Louisiana, at the April Term, A. D. 1855, of the said Court, held at the City of New Orleans, in the District aforesaid, on the twenty-fourth day of April, 1855.

Be it remembered, that heretofore, to wit, on the seventh day of November, 1854, came E. I. Dupont de Nemours & Co., by their attorneys, Messrs. Durant and Horner, in the Clerk's office of said Court, and filed a transcript of a record from the District Court of the United States for the Eastern District of Louisiana, which said transcript is in words and figures as follows, to wit:

United States District Court. Eastern District of Louisiana.

In Admiralty.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG "ANNE ELIZABETH."
No. 6875.

Libel.

(Durant and Horner, Proctors.) Filed June 3d, 1853.

To the Honorable Theodore H. McCaleb, Judge of the District Court of the United States for the Eastern District of Louisiana.

The libel and complaint of E. I. Dupont de Nemours and Company, a commercial firm domiciled in the City of Wilmington, State of Delaware, and composed of Henry Dupont, Alexis Irène Dupont, and Eleuthère Ireneé Dupont, against the Brig Anne Elizabeth, in a cause of contract civil and maritime. And thereupon the said E. I. Dupont de Nemours and Co., allege and articulately propound as follows:

First, that the libellants, at Dupont's Powder House on the River Delaware, and within the State of Delaware, and within the ebb and flow of the tide, and within the port of Washington, and within the admiralty and maritime jurisdiction of this honorable Court, entered into a certain contract of affreightment then and there, between them the libellants of the one part, and the Captain of the said

Brig "Anne Elizabeth" on the other part, by which it was stipulated and agreed, that, for certain freight and primage, the said captain and the owners of said Brig would take on board in good order and condition, and convey to New Orleans, and there deliver to P. Rotchford, in the like good order, certain kegs, half kegs, quarter kegs and cases of powder.

Second, that the said powder was duly ladened on board the said Brig Anne Elizabeth, and two bills of lading evidencing this fact, and the contract as above set forth was signed by the mate of said brig, a certain J. H. Cutter, on the 20th of December, 1852, and which for greater certainty are made part of this libel, and are lettered A and B.

Third, that the invoice of said powder, and the said bills of lading, show that the following were the particulars of said shipment, with the current wholesale prices in the market of New Orleans, to wit:

Mark T. H. L.

1000 kegs powder, at	$4 50,	. . . .	$4,500 00
50 cases canister, do.	7 75,	. . . .	387 50
175 kegs, do.	4 50,	. . . .	787 50
600 half kegs, do.	2 37½	. . . .	1,425 00
100 quarter kegs, do.	1 33¾	. . . .	133 75
			$7,233 75

Fourth, that on the arrival of the Brig "Anne Elizabeth" at the port of New Orleans, libellant required of the said brig's officers to deliver said packages of powder in conformity to their contract, but said officers failed to deliver the following:

972 kegs powder, at	$4 50,	. . . .	$4374 00
563 half do.	2 37½,	. . . .	1337 13
99 quarter kegs,	1 33¾,	. . . .	132 41
12 cases canister,	7 75,	. . . .	93 00
1646 packages.			$5,936 54

Say sixteen hundred and forty-six packages, worth in New Orleans five thousand nine hundred and thirty-six 54-100 dollars, which amount with interest from the fifteenth day of January, 1853, is now due to libellants.

Fifth, that the owners of said Brig "Anne Elizabeth," have not paid the libellants any part of the said sum, although often requested thereto, and now utterly neglect and refuse to do so.

Sixth, that all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable Court, in verification of whereof if denied, libellants crave leave to refer to the

depositions and other proofs to be by them exhibited in this cause. Wherefore libellants pray that process in due form of law, according to the course of courts in causes of admiralty and maritime jurisdiction, may issue against Brig "Anne Elizabeth," her tackle, apparel and furniture, wheresoever the same shall be found, and that all persons having or pretending to have any right, title, or interest therein, may be cited to appear and answer all and singular the matters so articulately propounded, and that this Court would be pleased to pronounce for the damages aforesaid, and for such other relief to the libellants as shall to law and justice appertain, and also to condemn the said brig, her tackle, apparel, and furniture, and all persons intervening for their interests in the said brig, in costs.

DURANT & HORNER,
Proctors for Libellants.

Philip Rotchford, agent and attorney in fact of the libellants, swears to the truth of the foregoing libel.

P. ROTCHFORD.

Sworn to and subscribed this 3d June, 1853, before

ROBERT M. LUSHER,
Deputy Clerk.

Order of Process.

Judge absent, process ordered out, by

N. R. JENNINGS,
Clerk.

Per ROBERT M. LUSHER,
Dy. Clerk.

Exhibit A.

Bill of Lading annexed to Libel.

Shipped, in good order and condition, by E. I. Dupont de Nemours & Co., in and upon the Brig "Ann Elizabeth," whereof John Vance is master for the present voyage, and now lying in port of Wilmington, and bound for New Orleans, one hundred and seventy-five kegs, six hundred half kegs, and one hundred quarter kegs of gunpowder, to be delivered at the magazine.

Being marked and numbered as in the margin; to be delivered in the like good order and condition, at the aforesaid port of New Orleans (the dangers of the seas only excepted), unto Mr. P. Rotchford or to his assigns, he or they paying freight for the said goods, at the rate of twenty cents per keg, halves and quarters in proportion, with five per cent. primage and average accustomed. In witness whereof, the master or the purser of said brig hath affirmed to three bills of lading, all of this tenor; one of which being accomplished, the others to stand void. Dated at Wilmington the 20th day of December, 1852.

J. H. CUTTER,
Mate.

(Marked in the margin.)

N. O.

Eg—— kegs.	300	1-2	1-4
Eg—— 175	300	100	
175	600 halves.	100 qr. kgs.	

Exhibit B.

Bill of Lading annexed to Libel.

Sheppard, in good order and condition, by E. I. Dupont de Nemours & Co., in and upon the Brig called the Ann Elizabeth, whereof J. Vance is master for the present voyage, and now lying in the port of Wilmington, and bound for New Orleans.

One thousand kegs of gunpowder (in canvass) and fifty cases gunpowder to be delivered at the magazine. Being marked and numbered as in the margin, to be delivered in like good order and condition, at the aforesaid port of New Orleans (the dangers of the seas only excepted), unto Mr. P. Rotchford or to his assigns, he or they paying frieght for the said goods, at the rate of twenty cents per keg and case, with five per cent. primage and average accustomed. In witness whereof the master or purser of the said brig hath affirmed to four bills of lading all of this tenor and date, one of which being accomplished, the others to stand void, *which being accomplished, the others to stand void.*

Dated at Wilmington, the 20th day of December, 1852.

J. H. CUTTER,
Mate.

(Marked in the margin.)

T. H. L.

Western rifle, ...	300 kegs.
Eg, ...	700 "
Eg canisters, ...	50 cases.
	1,000 kegs.
	50 cases.
1,050 kegs and cases, @ 20 cts., . .	$210 00
5 per cent. primage, ...	10 50

Admiralty Warrant.

The President of the United States. To the Marshal of the Eastern District of Louisiana, or to his lawful Deputy, greeting:

You are hereby commanded forthwith to seize and into your possession take, the Brig "Ann Elizabeth," her tackle, furniture, and

apparel, now libelled by E. I. Dupont de Nemours & Co., of Wilmington, Delaware, in a cause of contract, civil and maritime (claiming $5,936 54, and interest from January 15th, 1853, damages, for goods not delivered), in the District Court of the United States, for the Eastern District of Louisiana; that you do cite and admonish the owner or owners, and all and every other person or persons, having, or pretending to have any right, title, or interest in or to the same, to be and appear before a District Court of the United States, for the District aforesaid, to be holden at the City of New Orleans, on or before the third Monday from the service hereof, to show cause, if any they have or can, why the said Brig "Ann Elizabeth," her tackle, apparel, and furniture, should not be condemned and sold, agreeably to the prayer of the libellants; and how you have executed this warrant that you make return according to law.

Witness the Hon. Theo. H. McCaleb, Judge of the said Court, this third day of June, 1853, and the 77th year of the Independence of the United States.

[SEAL.] ROBT. M. LUSHER,
D'y Clerk.

Marshal's Return.

Received, June 3d, 1853, and seized and took into my possession, the Brig "Ann Elizabeth," and on the same day, the said brig was released from seizure, and delivered to John Vance, he having filed a claim to said vessel (in the Clerk's office from whence this writ issued), and furnished bond with George W. Hynson, as security. Said bond is herewith returned.

J. P. WALDEN,
U. S. Marshal.

United States District Court.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH." } In Admiralty.

Claim.

Filed June 3d, 1853.

And now comes into Court, in the above cause, John Vance, actual master of the Brig "Ann Elizabeth," libelled in the above cause, and on oath represents that the sole, true, and *bona fide* owners of said brig, are deponents, John Vance, of Bridgeport, New Jersey; Martin Thompson, of New York; Calvin Taggart, of Wilmington, Delaware; John T. Gause, also of Wilmington, and C. Ogden, also of Wilmington; McDonald and Laughlin, of Philadelphia; that no other person is interested in the ownership, and that deponent is bailee for and agent of said co-owners of the said brig.

JOHN VANCE.

Sworn to and subscribed at New Orleans, this 3d June, 1853, before me.

ROBT. M. LUSHER,
D'y Clerk.

Wherefore, the said claimant now prays this Court to order the said brig to be restored to his custody, on his executing the stipulation as required by law.

JOHN VANCE.

United States of America. District of Louisiana.

Bond of $11,803 08, for release of Brig.

Know all men by these presents, That we, John Vance, of Bridgeport, New Jersey, claimant, and part owner and agent of the owners of the Brig "Ann Elizabeth," as principal, and George W. Hynson as surety, are held, and firmly bound, unto E. I. Dupont de Nemours and Co., libellants, in the sum of eleven thousand eight hundred three dollars and eight cents, in lawful money of the United States, for the payment whereof, to the said E. I. Dupont de Nemours and Co., their heirs, executors and administrators, firmly by these presents.

Witness our respective names and seals, hereunto affixed by us at New Orleans, this third day of June, A. D. 1853.

Whereas, an admiralty warrant was lately issued out of the Honorable the District Court of the United States, for the District of Louisiana, at the suit of E. I. Dupont de Nemours and Co. *v.* Brig Ann Elizabeth, her tackle, apparel, and furniture, and numbered 6875 on the Docket of the said Court, commanding the Marshal to seize and take into his possession the Brig Ann Elizabeth, &c., which has been seized accordingly, but has been released from said seizure, and delivered to John Vance, the claimant and part owner, &c., thereof, the said John Vance having at the time and by reason of the signing, sealing, and delivery of these presents, filed a claim to the said Brig Ann Elizabeth, &c., in the Clerk's office of the said Court, and which claim is now of record. Now the condition of the above obligation is such, that if the said claimant and surety abide by all the orders, interlocutory or final, of the Court, and pay the said libellants to the amount awarded, by the final decree rendered in the Court to which the process is returnable, or in any Appellate Court, then the foregoing obligation is to be void, otherwise to remain in full force and virtue.

JOHN VANCE, [L. S.]
GEO. W. HYNSON, [L. S.]

Signed, sealed, and delivered in the presence of
J. P. WALDEN.

Eastern District of Louisiana.

On this 3d day of June, 1853, personally appeared George W. Hynson, of New Orleans, who being duly sworn, deposes, that after payment of all just debts and liabilities against him, he is worth in property in this city over and above the amount of penalty of this bond.

GEO. W. HYNSON.

Sworn to and subscribed at New Orleans, this said 3d day of June, 1853, before

R. M. LUSHER,
U. S. Commissioner for the Eastern District of Louisiana.

To the Honorable Theodore H. McCaleb, Judge of the District Court of the United States, for the Eastern District of Louisiana.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH."

Answer.

Filed 18th June, 1853.

And now comes before this Honorable Court, John Vance, master and part owner of the Brig "Ann Elizabeth," intervening for his own interest, and for the interest of the other owners in the Brig "Ann Elizabeth," libelled in the above-entitled cause, and for answer to the libel and complaint of the above E. I. Dupont and Co., says: 1st. That he reserves all advantages and exceptions herein; 2d. That he admits the several matters in the first and second articles of the said libel pleaded, to be true as therein alleged: but further alleges and propounds that the matters in the first and second articles of the said libel pleaded, to be true as therein alleged: but further alleges and propounds that the matters in the *third*, *fourth*, *fifth*, and *sixth* articles of the said libel, are in great part falsely alleged; 3d. Respondent propounds and alleges, that the Brig "Ann Elizabeth," being in good order, stanch, strong, and seaworthy, and well and sufficiently manned and equipped, sailed from the Port of Philadelphia on the 19th December, 1852, and in the afternoon of the said day came to anchor at Dupont's powder house, and on the 21st of said December, got under weigh at 3 o'clock, P. M., bound to New Orleans, Louisiana; but the wind being stormy, came to anchor in a safe place, and on the next day got under weigh and proceeded to sea. And that on the 23d, 24th, 25th, 26th, 27th, and 28th days of said December, 1852, the weather was very severe, the wind blowing in strong gales, and the sea running very high; that from the 23d of said December to the 27th thereof, the weather being so heavy and squally, and the sea running so high, the brig was put under short sail, and was caused

by the great stress of weather to labor and strain very badly all the while; and particularly on the 27th of said December, the wind being more moderate with a very heavy sea running, caused the brig to ship much water on deck, and to strain badly. That at 8 o'clock P. M., on the said 27th of said December, it being calm but squally, with a heavy sea running, the pumps of said brig were sounded, and it was found that the water was two feet deep in the hold: that the brig was then kept before the sea, and all hands turned to the pumps: at 10 o'clock P. M. of same day again sounded the pumps, and found the water four feet deep in the hold; when it was found necessary for the safety of all concerned to lighten the vessel; and accordingly commenced throwing over the deck load: that after getting it over again sounded the pumps and found the water gaining in the hold; when they commenced throwing over the underdeck load, consisting of powder, hollow ware, spades, shovels, castings, &c., and pumping all the while; that at 3 o'clock in the morning of the 28th of December, 1852, finding they were gaining on the water, stopped throwing overboard the cargo, and turned all hands to the pumps, and at 5 o'clock in the morning of said 28th December, succeeded in freeing the vessel, and at 10 o'clock A. M. same day kept off on the course, being obliged to keep the pumps going constantly. 4th. Respondent further alleges that during the whole passage through the pumps of the "Ann Elizabeth" were well attended to, and the vessel well equipped and manned; that by the extraordinary stress of weather during the first part of aforesaid passage, the said Brig "Ann Elizabeth" was caused to labor and strain so badly that she sprung aleak, so that it became necessary to throw overboard a portion of the cargo for the safety of the vessel; and that among that thrown over, was a portion claimed by libellants herein; and that unless the same had been thrown over your respondents believe, and so allege, that the vessel would have filled and gone down.

5th. Your respondent further alleges and propounds, that the jettison made of a portion of the cargo, claimed by libellants, was caused by the perils of the sea, by the very great stress of weather before mentioned, causing the seams of the said brig to open, so that she leaked as before stated; and that the said jettison was made and caused by no want of skill, and care, or exertion, in the officers and crew, or of any one concerned in the said brig, and by no lack of equipment of said brig, nor by any unseaworthiness of said brig.

6th. Respondent alleges, that all and singular the premises are true; in verification, if denied, respondent begs leave to refer to the deposition, and to the proofs to be by him exhibited in this cause. Wherefore respondent prays that this Court be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

V. H. IVY,
Attorney for Respondents.

Personally appeared V. H. Ivy, proctor and agent of respondent, herein, and, being duly sworn, declares, that the facts contained in this answer are true to the best of his belief or knowledge.

V. H. IVY.

Sworn to and subscribed, before me, this 18th June, A. D. 1853.

WILLIAM CORNELIUS,
U. S. Commissioner.

United States District Court, Eastern District of Louisiana.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG "ANNE ELIZABETH."

Proceedings in Court. 1853, May Term, pending. In Vacation. In Admiralty.

In chambers . . . . . Honorable Theo. H. McCaleb; New Orleans, Friday, September 23d, 1853. By order of the Judge, received and filed 19th instant, the following order is entered:

Motion and Order for Commission.

On motion of Durant and Horner, of counsel and proctors for the libellants, and, on showing to the Court an affidavit, filed herewith, that John Peoples, Jacob Zebley, and others, residing at Wilmington, in the State of Delaware, are witnesses material to the libellants, to make out their case: It is ordered by the Court, that a Commission issue to take the testimony of said witnesses, and that the same be directed to Leonard E. Wells, a United States Commissioner for the State of Delaware, or to any justice or judge of said State, or to any chancellor, justice, or judge of a Supreme or Superior Court in said State, mayor, or chief magistrate, of a city in said State, or any judge of a County Court or Court of Common Pleas in said Court.

(Signed) T. H. McCALEB,
U. S. Judge.

Saturday, December 3d, 1853.

In Court. Stated Sessions. New Orleans. Present, Honorable T. H. McCaleb.

On motion of Messrs. Durant and Horner, proctors for libellants, it is ordered by the Court, that V. H. Ivy, Esq., proctor for claimants, show cause on Wednesday next, the 7th day of December, 1853, at 10 o'clock A. M., why the Commission, now on file in this honorable Court, containing the testimony of John Peoples and Jacob Zebley, witnessed witnesses on the part of the libellants,

should not be opened, and filed, and said testimony read on the trial of this cause.

Wednesday, December 7th, 1853.

The rule herein, entered on the 3d instant, came regularly up for hearing; C. W. Horner, Esq., appearing for the libellant, plaintiff, and V. H. Ivy, Esq., for the claimants, in opposition. A question of fact arising, the Court required affidavits; and the further hearing of the matter was continued till Saturday, the 10th instant, at 10 o'clock A. M.

District Court of the United States for the Eastern District of Louisiana. In Admiralty.

E. I. DUPONT DE NEMOURS & Co.
v.
The Brig ANNE ELIZABETH.

Statement of Thomas J. Durant, as to service of Interrogatories.

Filed December 10th, 1853.

I obtained an order for a commission in this case, to examine witnesses in Wilmington, Delaware; the date will appear on the minutes. I took the interrogatories to the office of Mr. Ivy, proctor of the claimants, in Commercial Alley, second floor; found the office locked. On the door was a written notice, stating that the professional business of Mr. Ivy would be attended to in his absence by Mr. McConnell, on the opposite side of the Alley, in the same office with P. W. Roberts, Notary Public. On going to that place I found that Mr. McConnell had left New Orleans for the North, and a written notice on his door stated that his professional business would be attended to in his absence by Mr. McCann. On inquiring for Mr. McCann, I was informed by P. W. Roberts, occupying the same office with him, that he was sick with the prevailing epidemic. A few days after I went again with the interrogatories to the office of Mr. Ivy; found it still locked up; went across to the office of Messrs. McConnell and McCann; found the former still absent, and that the latter had gone across the lake for the restoration of his health; and could not learn when either of them would be back. I then went to the counting-room of G. W. Hynson, corner of Natchez and Camp Streets, the Agent here of the owners of the Brig Anne Elizabeth, and informed him that I had come with the interrogatories, for the purpose of getting them crossed, and desired to know from him, what was to be done. Was informed by him that I must refer to Mr. Ivy, who had charge of the matter, and that in the absence of Mr. Ivy, he, Hynson, could do nothing. I met the father of Mr. Ivy at the office of the Board of Health, in the building in which this Court is held, and inquired from him as to the return of Mr. Ivy; was informed that he would be here about

the 1st of November, 1853. I sent the Interrogatories forward with the commission on the 21st of September, 1853.

New Orleans, 10th December, 1853.

THOMAS I. DURANT.

Sworn to and subscribed, the said 10th December, 1853, before

ROBERT M. LUSHER,
Deputy Clerk.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG ANNE ELIZABETH.

May Term, pending. Saturday, December 10th.

On the rule herein entered on the 3d instant, the Court having considered the affidavit of Thomas I. Durant, Esq., filed this day: It is now ordered that said rule be made absolute.

E. I. DUPONT DE NEMOURS & Co.
v.
The Brig "ANN ELIZABETH."

Proceedings in Court, Wednesday, January 11th, 1854.

This cause came regularly up for hearing, T. I. Durant and W. S. Stansberg (in his absence), Esqs., appearing for the libellants, and V. H. Ivy, Esq., for the claimants. Attachments were granted for Richard Swain and Josiah Lovett, witnesses for libellants, and for Thos. G. Mackie, for claimants. The pleadings having been read to the Court, the libellants offered in evidence the two bills of lading annexed to their libel; the oral testimony of Philip Rotchford and William B. McCutcheon, sworn (on the value of the goods described in the libel), and of Henry Tronchet (on the prices in the invoice), together with the original invoice (C), verified by him, and filed the depositions of John Peoples and Jacob Zebley, taken under commission, and admitted by order of Court, of December 10th, 1853, and also caused to be sworn, Josiah Lovett (who referred to his association, Richard Swain, absent, for the information asked of him).

The claimants offered in evidence the oral testimony of Captains Woodbury, Wm. H. Watts, Saunders Herlin, and Jas. H. Huckins (on the effect of boisterous weather on the seams of new vessels), of Thos. G. Mackie (on the state of the hull of the brig, on her arrival here), and also offered the protest marked S, which, objected to by libellants, was admitted as *prima facie* evidence of the facts set forth therein. The farther hearing of the cause was then continued till Saturday, the 14th instant, at 11 A. M., and it was ordered that an attachment be issued, to secure the attendance, at that time, of Richard Swain, a witness for the libellants.

Saturday, January 14th, 1853.

The hearing of this cause was resumed from the 11th inst.; the Court having first ordered that the testimony of Richard Swain and other witnesses in Court be taken, in writing, before U. S. Commissioner Lusher; C. W. Horner, Esq., appearing for the libellants, and V. H. Ivy, Esq., for the claimants, respondents. The libellants offered in evidence the depositions of Richard Swain and R. L. Robertson, together with the survey marked X, and referred to in the former, and the claimants *the claimants* the deposition of Alex. McNeil; when, after argument by V. H. Ivy, Esq., for the claimants, and C. W. Horner, Esq., in reply, for libellants, the Court took the case under advisement.

United States District Court.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH." } 6875.

EVIDENCE OFFERED FOR LIBELLANTS.

(1. *See Bills of Lading, A and B, on folios* 5 *&* 6.)

2. *Invoice C.*

Verified by Henry Tronchet, witness, 11th January, 1854.

Invoice of powder shipped on board Brig "Ann Elizabeth," by Messrs. E. I. Dupont de Nemours & Co., in Wilmington, Delaware, and consigned to P. Rotchford, in New Orleans.

Mark.		
T. H. L. & Co.,	1000 kegs powder, at 4 50, .	$4,500 00
"	50 cases canister, ditto, at 7 75,	387 50
N. O.,	175 kegs, ditto, at 4 50, . .	787 50
"	600 half kegs, ditto, at 2 37½,	1,425 00
"	100 quarter kegs, ditto, at 1 33¾,	133 75
		$7,233 75

Lost.

972	kegs powder, at 4 50, ...	$4,374 00
563	half kegs, ditto, at 2 37½, ...	1,337 13
99	quarter kegs, ditto, at 1 33¾, . . .	132 41
12	cases canister, ditto, at 7 75, . . .	93 00
1646	packages.	$5,936 54

NEW ORLEANS, June 2d, 1853.

Memorandum of freight due claimants, if libellants record.

972	kegs, at 20 c., ...	$194 40
563	half kegs, at 10 c., ...	56 30

99 quarter kegs, at 5, ...	4 95
12 cases canister, at 20 c., ...	2 40
	$258 05
5 per cent. primage, . . .	12 90
	$270 95

2. Depositions of John Peoples and Jacob Zebley, taken under Commission to New Castle County, Delaware; offered in evidence for Libellants, January 11th, 1854.

Commission.

District Court of the United States, holding Sessions at New Orleans, in and for the Eastern District of Louisiana.

To Leonard E. Wells, Esquire, a United States Commissioner for the State of Delaware, or to any justice or judge of any Court in said State; justice or judge of a Supreme or Superior Court in said State; mayor or chief magistrate of a city in said State; or any judge of a County Court or Court of Common Pleas in said State.

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and cause to come before you, John Peoples and Jacob Zebley, and them duly examine on oath, touching and concerning certain matters and things in a case now pending in the said Court, wherein

E. I. Dupont de Nemours & Co. are Libellants, and owners of Brig "Anne Elizabeth" are Claimants and Respondents, and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this Court without delay, to be read in evidence on the trial of said cause, and send also this writ, together with the interrogatories and cross-interrogatories annexed. Witness the Honorable Theo. H. McCaleb, Judge of the District Court of the United States, at the city of New Orleans, this nineteenth day of September, Anno Domini 1853, and the 78th year of the Independence of the United States of America.

N. R. JENNINGS,
Clerk.

I hereby certify that the parties, claimants and respondents, named in the within commission, were duly notified by me to attend the execution of the said commission. Witness my hand, this seventh day of October, A. D. 1853.

LEONARD E. WALES,
U. S. Commissioner.

The execution of this commission appears in a certain schedule hereunto annexed.

LEONARD E. WALES,
U. S. Commissioner.

Interrogatories.

E. I. DUPONT DE NEMOURS
v.
BRIG ANNE ELIZABETH.

In the District Court of the United States for the Eastern District of Louisiana, in Admiralty.

Interrogatories to be propounded by virtue of the annexed commission, and answered under oath by John Peoples and Jacob Zebley, witnesses on behalf of the libellants in the above-named cause.

First. What is your name, age, residence, and occupation?

Second. How long have you lived in your present place of residence? Whose employ are you now in, and how long have you been in said employ?

Third. If you say you are in the capacity of libellants, in what capacity are you so employed, and how long have you been in that capacity, *are you so employed, and how long have you been in that capacity?* Were you so during the months of November and December, 1852.

Fourth. During those months was any powder shipped by the libellants on board the Brig Anne Elizabeth for New Orleans? If yea, what were the packages in which it was sent? What were the marks and numbers of each package? What were the contents of each package as to weight and quality of powder?

Fifth. Have you an invoice of the said shipment of powder by the Brig "Anne Elizabeth?" If so, will you please annex a copy thereof to your answer?

Sixth. Does the said invoice contain a true and correct account of the packages of powder aforesaid, and of the quality and weight of the contents?

Seventh. Do you know of any other matter or thing useful to the libellants herein? If so, will you please state the same as fully as if thereunto specially interrogated?

New Orleans, 19th September, 1853.

DURANT & HORNER,
Proctors for Libellants.

Depositions.

Depositions of witnesses, produced, sworn and examined on oath, on Friday, the seventh day of October, in the year of our Lord, one thousand eight hundred and fifty-three, by me, Leonard E. Wales, a United States Commissioner for the District of Delaware, by virtue of a commission issuing out of the District Court of Louisiana, for the examination of witnesses in a case now depending in the said Court, wherein E. I. Dupont de Nemours & Co. are libellants, and owners of Brig "Anne Elizabeth" are claimants and respondents. John Peoples, of Christiana Hundred, in the County of New Castle

State of Delaware, a witness produced, sworn and examined on the part of the libellants, deposeth and saith as follows.

I. To the first interrogatory this deponent saith: My name is John Peoples; I am thirty-three years of age, reside in Christiana Hundred, in the County of New Castle and State of Delaware, and am a clerk by occupation.

II. To the second interrogatory this deponent saith: I have lived in my present place of residence for about seventeen years; I am now in the employ of E. I. Dupont de Nemours & Co., and have been in their employ for seventeen years.

III. To the third interrogatory this deponent saith: I am employed by the libellants as general and shipping clerk, and have been engaged in that capacity for nine years, and was so employed during the months of November and December, 1852.

IV. To the fourth interrogatory this deponent saith: A quantity of powder was shipped by the libellants on board the brig Anne Elizabeth for New Orleans, in the month of December, 1852. The powder was shipped in eleven hundred and seventy-five kegs, twenty-five pounds to each keg; six hundred half-kegs, twelve and a half pounds to each keg; one hundred quarter-kegs, six and a quarter pounds to each keg; and fifty cases of canister powder. Twenty-five pound kegs, in canvass, were marked T H L; fifty cases were marked C. H. Larkin & Co., St. Louis. One hundred and twenty-five-pound kegs, six hundred twelve-and-a-half-pound kegs, and one hundred six-and-a-quarter-pound kegs, were marked N. O.; all of this powder was sporting powder.

V. To the fifth interrogatory this deponent saith: I annex to this my answer a true copy of the invoice of shipment of the powder by brig Anne Elizabeth, contained in schedule marked A.

VI. To the sixth interrogatory this deponent saith: The said invoice does contain a true and correct account of the packages of powder aforesaid, and of the quality and weight of the contents.

VII. To the seventh interrogatory this deponent saith: I can't think of any other matter or thing useful to the libellants herein.

JOHN PEOPLES.

Deposition of John Peoples, taken, sworn to, and subscribed, this seventh day of October, A. D. 1853, before me.

LEONARD E. WALES,
United States Commissioner.

Exhibit A.

Invoice of Gunpowder shipped by E. I. Dupont de Nemours & Co., on board the brig Anne Elizabeth, Captain Vance, from Wilmington, Delaware, to address of P. Rotchford, of New Orleans, Dec. 20th, 1852.

Marked T. H. L. Eg.	700 kegs rifle powder,	a $4,	$2,800 00
	Western rifle, 300 kegs rifle powder,	a $4,	1,200 00

C. H. Larkin & Co., St. Louis, Eg. Canv's, 50 cases rifle powder, a $6 50,		325 00
N. O., Eg. 300 half kegs, a $2,		600 00
Eg. 175 kegs, a $4,		700 00
300 half kegs, a $2,		600 00
100 qu'r kegs, a $1,		100 00
		$6,325 00

Jacob Zebley, of Brandywine Hundred, in the County of New Castle, and State of Delaware, a witness, produced, sworn, and examined, on the part and behalf of the libellants, deposeth and saith as follows:

I. To the first interrogatory, this deponent saith: My name is Jacob Zebley; I am sixty-three years of age; I reside in Brandywine Hundred, in the County of New Castle and State of Delaware; and by occupation a farmer.

II. To the second interrogatory, this deponent saith: I have lived in my present place of residence for thirteen years and upwards; I am employed by E. I. Dupont de Nemours & Co. to superintend the placing of powder on board of vessels when they call for it, and have been engaged in that capacity for thirteen years and upwards.

III. To the third interrogatory, this deponent saith: I am employed by the libellants to see that all powder, which is brought to the river magazine for shipment, is put on board the vessels; have been employed in that capacity for thirteen years and upwards, and was so employed during the months of November and December, 1852.

IV. To the fourth interrogatory, this deponent saith: On the twentieth day of December, 1852, there was shipped on board the Brig Anne Elizabeth, for New Orleans, a quantity of powder amounting in the aggregate to fifteen hundred twenty-five-pound kegs and fifty boxes of twenty-five pounds each. This statement includes the whole, half, and quarter kegs. I cannot answer as to the quality of the powder, though I believe it was sporting powder. It is not my duty to take account of the marks, which are mentioned in the bills of lading.

V. To the fifth interrogatory, this deponent saith: I have no invoice of the said shipment of powder.

VI. To the sixth interrogatory, this deponent saith: I know nothing of the contents of the invoice.

VII. To the seventh interrogatory, this deponent saith: I know of nothing further that would be useful to the libellants herein.

JACOB ZEBLEY.

Deposition of Jacob Zebley, taken, sworn to, and subscribed, this seventh day of October, A. D. 1853, before me.

LEONARD E. WALES,
U. S. Commissioner.

3*d. Depositions of R. Swain and R. L. Robertson.*

Offered for Libellants, January 14th, 1854.

United States District Court, Eastern District of Louisiana.
In Admiralty.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig ANN ELIZABETH. } No. 6875.

Testimony taken, by order of Court, before Robert M. Lusher, U. S. Commissioner, for Libellants.

Captain Richard Swain, being duly sworn, deposes, that, in January, or February, last, 1853, he examined the hull of the Brig Ann Elizabeth prior to her being placed in the dry dock, and after she was placed there. Before she was placed there, witness, on a careful examination, discovered two woodworm-holes on *on* each side at about the 8 feet mark; and, being fearful that this was not the only cause of the leak, he recommended the vessel to be placed in dock for further examination. On her being placed there, witness again examined her, and found one large woodworm-hole on the starboard bow about the 3 feet mark, and ordered it, with the others, to be carefully bored out to make them true, and plugged up, which was done. Witness examined the bottom of the vessel carefully, inside and out, and could find no other cause for leakage, she appearing to have been built of good materials, and well put together, and showing no signs of strain in any part of her. He examined the vessel again after she came out of dock, and found that she was perfectly tight. She has since been on a voyage to Philadelphia and back, and was examined by witness on her return to this port, and found tight; she was perfectly tight. She has since been on a voyage to Philadelphia and back, and was examined by witness on her return to this port, and found tight, stanch, and strong, in every respect, which enables the witness to state as his opinion, that the woodworm-holes spoken of were the sole cause of her leaking. On being shown "copy of survey marked X," witness says that this is a true copy of the original survey from the books, made by witness at the time therein stated, and is in all respects correct and true. Witness is a marine surveyor employed by the board of underwriters of this city, and for the last 14 years, since 1839, has been attached to the insurance office as a marine surveyor.

Cross-examined by Mr. Ivy.

The stream of water which could go through the two first worm-holes found by witness, would be from an eighth to a quarter of an inch in diameter. That under the bows was *over* a quarter of an inch in diameter. Witness found no other worm-holes of consequence worth mentioning. Witness went to survey the brig at the

request of her master. He is the marine surveyor for the Board of underwriters—that is the Insurance Companies. Witness did not observe her pumps particularly. She had good pumps and he heard no complaint of them. She was a new vessel, it was her first voyage, and her pumps were in good order. To make the survey the first time he was aboard two hours, and the second an hour and a half. The second time the vessel being placed in dock with water in her, the moment the water in the dock was below the water in the vessel, this commenced running out of the last-mentioned worm-holes immediately, by which means it was lately discovered.

RICHARD SWAIN.

ROBERT M. LUSHER,
Ct.

Captain Richard L. Robertson being duly sworn deposes, that Captain Vance, of the brig, sent for him to examine her, last January or February, 1853. At that time she had stages around her, and a caulker or carpenter, and two or three other men examining her to see what had caused her to make so much water as she did. Witness went on the stages and around the vessel with them, and was shown a large number of woodworm-holes. There were also some shaky places in the planks and small knots, which did make her leak (objected to by Mr. Ivy), but witness was not of the opinion that this was all that made the vessel leak. These might have been stopped as the vessel lay, but being apprehensive that there were others under water, witness advised the captain to have her put into the dock. The leakage witness thinks (objected to) was caused by the worm-holes in her, not by strainage, as he saw no signs of strainage. She was a new vessel, well fastened and well bound, and built in Wilmington, Delaware. She was on her first voyage.

Cross-examined.

Witness did not examine her bottom; doesn't know what was the matter with it. Witness is a marine surveyor for the underwriters and for all who call him. Witness paid no particular attention to her pumps; heard no complaints of them; thinks they were good. They were new, as was the vessel. The worm-holes seen by witness were just below her bends in her boot-top.

RICHARD L. ROBERTSON.

ROBERT M. LUSHER,
Clerk.

Depositions of Richard Swain and Richard L. Robertson, taken in presence of C. W. Horner, Esq., for libellant, and C. H. Ivy, Esq., for claimants, and of the witnesses; to them read, and by them subscribed and sworn to, this 14th January, 1854, before

ROBERT M. LUSHER,
United States Commissioner.

Fees, $2 50, paid by libellants' secretary.

Survey X.

Referred to by Richard Swain, witness, January 14th, '54.

SURVEYOR'S OFFICE, CRESCENT MUTUAL INSURANCE CO.
Corner of Camp Street and Commercial Place.

State of Louisiana, Port of New Orleans.

The undersigned, inspectors for underwriters of New Orleans, and general marine and river surveyors for the inspection of vessels, steamers, and cargoes, hereby certify, that on February 2d, held a survey on the Brig Ann Elizabeth, Vance, master, from Philadelphia, she having sprung aleak on her passage to this port, and made water so freely as to oblige the master to jettison a part of the cargo, the particularly of which will more fully appear in the protest of said master. On a careful examination, the cargo being out, we find two holes, one on each side, in the centre of the plank, at about the eighth and a half feet mark, nearly amidships; they were worm-holes, and from the vessel's making so much water, we fear that there is more in the bottom. Recommend her to be placed in dock for further examination. February 4th, held another survey on the brig, she being in the Dry Dock, and on examination find a large woodworm-hole on the starboard bow at about the three and a half feet mark. The vessel appearing in good order in every other respect, we recommend the holes to be bored out and well plugged up, and the vessel to be taken out of dock again to receive her return.

Given under our hands and seal this 5th of February, 1853.

(Signed) RICHARD SWAIN,
JOSIAH LOVETT.

I hereby certify the above to be a true copy of the record, in the marine surveyor's office.

E. C. SWAIN,
Secretary.

EVIDENCE FOR CLAIMANTS.

United States of America. State of Louisiana. City of New Orleans.

Protest.

11th Jan. '54, admitted as prima facie evidence.

By this public instrument of protest, be it known, that before me, Richard Brenan, a notary public, duly commissioned and sworn, in and for the Parish of Orleans, State of Louisiana, and dwelling in the City of New Orleans, personally came and appeared John Vance, master of the brig called the "Ann Elizabeth," who, having heretofore, to wit, on the twentieth day of January, noted before me, notary,

for the uses therein set forth, his protest in due form of law, now requires me, notary, to extend said protest. And with the said John Vance also came and appeared, J. H. Cutten, mate, Jeremiah Holmes, Wm. Conner, and Michael Snee, seamen, all belonging to the said brig "Ann Elizabeth," all of whom being by me first duly sworn according to law, do voluntarily, freely, and solemnly declare and depose as follows, that is to say: that he, the said John Vance, departed in and with the said brig, as master thereof, from Philadelphia, having on board a cargo of merchandize, and bound for the port of New Orleans, that the said brig was then stout, stanch, and strong; had her cargo well and sufficiently stowed and secured; was well masted, rigged, manned, tackled, victualled, apparelled, and appointed, and was in every respect fitted for the voyage she was about to undertake. Sailed from Philadelphia on the 19th December, 1852; in the afternoon came to anchor at Dupont's Powder House; 21st got under way at 3 P.M., wind N. E. and stormy; came to anchor at Reedy Island; 22d got under way and proceeded to sea; 23d fresh gales and squally, vessel under short sail; 24th strong gales and squally, with a heavy sea running, causing the vessel to labor and strain badly; at 12 single-reefed foretopsail; 25th commences same; at 4 P.M. double-reefed foretopsail and mainsail; at 9 P.M. the gale increasing, took in foresail, close-reefed foretopsail, and kept off before the wind, a tremendous heavy sea running, causing the vessel to labor and strain badly; 26th gale continued, vessel laboring and straining badly; 27th more moderate with a heavy sea running, causing the brig to strain badly and shipping much water on deck. At 8 P.M. calm, with squalls and heavy sea—sounded the pumps, and found 4 feet water; at 10 P.M. again sounded, and found 4 feet water, when it was deemed necessary for the safety of all concerned to lighten the vessel, and accordingly commenced throwing over the deck load, after getting it over, again sounded, and found the water was gaining. Then commenced throwing over the under-deck cargo, consisting of powder, hollow-ware, spades, shovels, castings, &c.; at 8 P.M. finding we were gaining on the water, stopped throwing over, and turned all hands to the pumps, and at 5 A.M. succeeded in freeing her; at 10 A.M. kept off on the course, being obliged to keep one pump going constantly; 28th more moderate, let out reefs, and made sail; latter part, wind again increasing to a gale, took in foresail, double-reefed mainsail, and close-reefed foretopsail. Vessel leaking about 500 strokes per hour; 29th same, at 6 P.M. wind increasing, took in mainsail and mainstaysail, and kept off before the sea, one pump going most of the time; 30th more moderate, let out the reefs and made sail, the sea being smoother, found the leak decreased to four hundred strokes per hour. After this, proceeded on the passage with moderate winds and weather, with occasional squalls, leak about the same until the 16th January, on which day made South Point Light, and at 12 midnight came to anchor; 17th was taken in

tow by a steamer, brought in over the Bar, and proceeded up the river; 19th arrived at New Orleans. During the whole passage the pumps were well attended to. And the said master further says, that all the damage and injury which already has or may hereafter appear to have happened or accrued to the said brig or her said cargo, has been occasioned solely by the circumstances before stated, and cannot nor ought not to be attributed to any insufficiency of the said brig or default of him, the deponent, nor of his officers and crew: whereupon he required me, notary aforesaid, to make his protest and this public act thereof, that the same may serve and be of full force and value as of right shall appertain. And thereupon the said master doth protest, and I, the said notary, at his instance and request, do by these presents publicly and solemnly protest against winds, weather, and against every accident, matter or thing, had or met with as aforesaid, whereby or through means of which the said brig or her cargo already has, or hereafter shall appear to have suffered or sustained damage or injury for all losses, costs, charges, expenses, damages and injury, which the said brig, the owner or owners of the said brig, or the owners, freighters, or shippers of her said cargo, or any other person or persons interested or concerned in either, already have or hereafter may pay, sustain, incur, or be put into, by, or on account of the premises; or for which the insurer or insurers of the said brig or her cargo is, or are respectively liable to pay or make good by contribution or average, according to custom, on their respective contracts or obligations; and that no part of such losses and expenses already incurred, or hereafter to be incurred, do fall on him, the said master, his officers and crew. Thus done at my office, in the City of New Orleans aforesaid, this 21st day of January, one thousand eight hundred and fifty-three, in the presence of Wm. H. Bird, and Geo. Clark, competent witnesses, who hereunto sign their names with said appearers, and me, notary.

Original signed

JOHN VANCE,
J. H. OUTLEN,
JEREMIAH HOLMES,
his
WILLIAM + CONNER,
mark
MICHAEL SMEE.
R. BRENNAN,
Not. Pub.

GEORGE CLARK,
WM. H. BIRD.

I hereby certify the foregoing to be a true copy of the original act of protest, extant in my current register. In faith of which, I hereby grant these presents, under my signature and seal of office, at New Orleans, this fourteenth day of June, eighteen hundred and three.

R. BRENAN,
Not. Pub.

Second Deposition of Alexander McNeill, for Claimants.

United States District Court. Eastern District of Louisiana. In Admiralty.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH." } No. 6875.

Testimony taken by order of Court, before Robert M. Lusher, U. S. Commissioner.

Alexander McNeil, a witness for claimants, being duly sworn, deposes that he unloaded the brig "Ann Elizabeth," about a year ago, as a stevedore; went aboard of her before she was made fast, just as soon as the steam tow-boat put her alongside. He unloaded her and piled the dunnage up fore and aft, and swept the hold clean. She had no water in her. Witness couldn't see any water above the skin or ceiling; the distance between her planks and her ceiling is witness thinks about eight inches. It is usual, when vessels make fast to the wharf, for their crews to leave them. If this vessel had made an unusual quantity of water, witness would have noticed it, as he was aboard of her nearly all the time she was discharging. Witness went down in her hold several times after she was discharged, and before she went into dock, and could see no water in her. It is usual for the stevedore's men to pump a vessel while she is discharging, and when she has no crew on board. This vessel's crew left her before she was discharged, about the time she came in the same day. Witness doesn't recollect that his men tried the pumps at all. If she had been making water he certainly would have known it. She made but very little water if any after she came in here. Her cargo was well stored, and damaged. Two weeks elapsed or pretty nearly two weeks from the time witness commenced discharging her, until she was put in dock, and she went in dock about two days after he finished discharging her. The vessel was not overloaded. Witness has discharged a good many vessels deeper than she was. Witness has discharged her once since then; she was more heavily and deeply loaded than on the first occasion. She seemed on the first occasion well equipped in all respects. Her pumps would throw out each between three or four inches (diameter) of water. She had double pumps, one on each side; witness thinks she had two pumps; every vessel has two.

No cross-examination.

Alexander McNeill, witness examined in presence of V. H. Ivy, Esq., for claimants, and C. W. Horner, Esq., for libellants, and of the witness; deposition to him read, and by him subscribed and sworn to this fourteenth day of January, 1854, before

ROBERT M. LUSHER,
U. S. Commissioner, Eastern District of Louisiana.

Com. fee, swearing witness, 0 10 c.
Testimony, 6 fol. 20, 1 20.
Paid by G. W. Hynson, 7th April, 1854, $1 30.
Close of evidence offered, January 11th, 14th.

December Term, 1853. Stated Sessions, Thursday, January 26th, 1854. Present: Hon. T. H. McCaleb.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH." } 6875.

Judgment and Decree.

The Court having taken this case under advisement, and carefully considered and reviewed the pleadings and the evidence, and being satisfied that the libellants have sustained the material allegations of their libel, and that they are entitled to the compensation and damages prayed for against the Brig "Ann Elizabeth," and it appearing to the Court that on the 3d day of June, 1853, the said brig was released from seizure, and delivered to her claimants, on a bond of admiralty stipulation, now of record: It is ordered, adjudged, and decreed, that there be judgment in favor of the libellants, and against John Vance, of Bridgeport, New Jersey, and his co-owners of the Brig "Ann Elizabeth," and George W. Hynson, of New Orleans, surety for the release of said brig, jointly and severally, for the full sum of $5936 54, less $270 95, freight, equal to ($5665 59) five thousand six hundred and sixty-five 59-100 dollars, with legal interest from the 15th January, 1853, and costs of suit to be taxed by the Clerk.

December Term, 1853. Stated Sessions, Monday, January 30th, 1854.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG "ANNE ELIZABETH." }

Motion for Rehearing.

On motion of V. H. Ivy, Esq., proctor for the claimants herein, and on his suggesting to the Court that the judgment herein rendered is contrary to law and evidence, in that the evidence herein proves that the Brig "Anne Elizabeth" sprung aleak at sea by the violence of the weather. And this being the act of God, that the owners of said vessel are not responsible for the damages which occurred: It is now moved that a new trial be granted herein, and ordered by the Court, that notice be given to the proctors of the libellants to show cause, on Saturday, the fourth day of February, A. D. 1854, at 10 o'clock A. M., why a new trial should not be granted said claimants.

December Term, 1853. Stated Sessions, Saturday, February 4th, 1854. Present Hon. T. H. McCaleb.

E. I. D. DE NEMOURS & Co.
v.
BRIG "ANN ELIZABETH."

The motion for a rehearing, herein entered on the 30th ult., was this day argued by V. H. Ivy, Esq., for the claimants, and C. W. Horner, Esq., for the libellants defendants, and submitted to the Court.

Friday, February 10th, 1854.

The Court having taken under advisement the application of the claimants herein for a new trial, and being satisfied that there is good ground for a rehearing: It is now ordered that said motion for a new trial be granted, and the case replaced on the issue docket.

February Term, 1854. Stated sessions, Thursday, April 6th, 1854. Present: Hon. T. H. McCaleb.

E. I. D. DE NEMOURS & Co.
v.
BRIG "ANN ELIZABETH."

This cause came regularly up for rehearing, when C. W. Horner, Esq., appeared for libellants, and V. H. Ivy, Esq., for claimants. In addition to the evidence formerly offered, the libellants read in evidence the depositions of Philip Rotchford and Henry Tronchet, and the claimants those of Thomas G. Mackie, Henry Thaten, and Geo. Clark, with the general average statement referred to in the last. The case was then argued by V. H. Ivy, Esq., for claimants, and C. W. Horner, Esq., for libellants (who called on the claimants' proctor to produce the average bond spoken of in Geo. Clarke's depositions, which said proctor stated that he would, if possible), when the Court took the case under advisement.

Additional evidence offered.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG "ANN ELIZABETH."

1st. For Libellants.

Depositions of P. Rotchford and H. Tronchet, offered April 6th, 1854.

United States of America, Eastern District of Louisiana, City of New Orleans, *ss.*

Be it remembered, that on this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and fifty-four, before me, Robert M. Lusher, a commissioner duly appointed, on the 29th

April, 1848, by the Circuit Court of the United States, in and for the Fifth Circuit and Eastern District of Louisiana, under and by virtue of the acts of Congress entitled: An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States, passed February 20th, 1812, and the act of Congress entitled, "An Act in addition to an act entitled, An Act for the more convenient taking of affidavits and bail, in civil causes depending in the Courts of the United States," passed March 1st, 1817, and the act entitled "An Act to establish the Judicial Courts of the United States," passed September 24th, 1789, personally appeared Philip Rotchford and Henry Tronchet, persons of sound mind and lawful age, witnesses for the libellants, in a civil suit now depending in the District Court of the United States, in and for the Eastern District of Louisiana, wherein E. I. Dupont de Nemours & Co., are libellants, and the owners of the Brig "Ann Elizabeth" are claimants; and the said witnesses being by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, did depose and say, in presence of, and in reply to the interrogatories to them addressed by the respective proctors hereinafter named as follows:

Philip Rotchford examined by Mr. Horner. I am a resident of this city, agent here of the libellants. Upon being shown the invoice marked C (same as filed), says the same is correct. This is my invoice. The number of kegs and the number of cases are taken from the bill of lading. We never receive any invoices. The prices were affixed by me. They are about the prices we sell at here. We usually sell to our customers one keg as cheap as we would twenty kegs or more, and there is very little sold by wholesale here, people being unwilling to keep a large stock on hand. The items in the invoice marked "Lost" are those which were short delivered.

Cross-examined by Mr. Ivy. Says he receives a commission of five per cent. for selling powder for libellants.

Henry Tronchet, examined by Mr. Horner. I am over twenty-four years of age; am clerk for Mr. Rotchford; have been in his employ for nearly eight years; I keep his books; I attend to the keeping of the powder accounts. No other house ships powder to Mr. Rotchford but the libellants. Upon being shown invoice marked "C," says that the same is in his handwriting. The prices attached to the items are about the same usually charged here—about the average price.

Cross-examined by Mr. Ivy. Made the invoice out from the original bills of lading received from libellants.

HENRY TRONCHET.

ROBERT M. LUSHER,
U. S. Comm'r.

March 29th, 1854.

United States of America,

Fifth Circuit and Eastern District of Louisiana, City of New Orleans, *ss.*

I, Robert M. Lusher, commissioner duly appointed, as aforesaid, do hereby certify, that the reason for taking the foregoing depositions is, and the fact is, that the witnesses, P. Rotchford and Henry Tronchet, were subpœnaed and brought before me at the instance of the libellants, and the claimants' proctor present made no objection to the taking of their testimony.

I further certify, that due notification was made out and served on the claimants' or adverse parties' proctor, who was at the time of taking said deposition within the said City of New Orleans, the place of taking the said deposition. I further certify, that on this 29th day of March, A. D. 1854, I was attended by C. W. Horner, Esq., for the libellants, and V. H. Ivy for the claimants, and by the witnesses, Philip Rotchford and Henry Tronchet, who are of sound mind and lawful age, and the said witnesses were by me carefully examined and cautioned, and sworn to testify the whole truth; and the depositions hereinbefore appearing were taken by H. A. Gliddon, a disinterested person, and in my presence reduced to writing, in the presence of the witnesses. And after carefully reading the same to the witnesses, they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of sealing up, directing, and forwarding the same with my own hand to the Court for which the same was taken. I further certify, that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of the said civil cause named in the caption.

In testimony whereof, I have hereunto set my hand and seal at New Orleans, this 29th day of March, A. D. one thousand eight hundred and fifty-four.

[L. S.] ROBERT M. LUSHER,
U. S. Commissioner in and for the Eastern District of Louisiana.

Commissioner's fee $6 50, paid by P. Rotchford for libellants, 7th April, 1854.

Notices to attorney for claimants, ...	$2 00
Service " "	1 00
4 writs of subpœna to witnesses' returns, . . .	1 30
Depositions (and 2 oaths, 20), 4 folios at 20=80+20 .	1 00
Certificates, 6 folios, ...	1 20
	$6 50

ROBERT M. LUSHER,
Commissioner.

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Additional Evidence for Claimants.

Depositions of Thomas G. Mackie, Henry Thaten, and George Clark.

Offered in Evidence on 5th April, 1854. For Claimants.

United States of America, Eastern District of Louisiana, City of New Orleans, *ss.*

Be it remembered, that on this fourth day of April, in the year of our Lord one thousand eight hundred and fifty-four, before me, Robert M. Lusher, a commissioner, duly appointed on the 29th April, 1848, by the Circuit Court of the United States, in and for the Fifth Circuit and Eastern District of Louisiana, under by virtue of the acts of Congress, entitled, "An Act for the more convenient taking of affidavits and bail in civil causes, depending in the Courts of the United States," passed February 20th, 1812, and the act of Congress, entitled, "An Act in addition to an Act, entitled An Act for the more convenient taking of affidavits and bail in civil causes depending in the Courts of the United States," passed March 1st, 1817, and the act entitled "An Act to establish the Judicial Courts of the United States," passed September 24th, 1789, personally appeared Charles G. Mackie, Henry Thaten, and George Clark, all of this city, persons of sound mind and lawful age, witnesses for the claimants, in a civil suit now depending in the District Court of the United States, in and for the Eastern District of Louisiana, wherein E. I. Dupont de Nemours & Co. are libellants, and the owners of the brig "Ann Elizabeth" are claimants and respondents, and the said witnesses being by me first carefully examined, and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, did depose and say, as hereinafter set forth on folios 1 to 8 inclusive.

Thursday, April 4th, 1854.

Virginius H. Ivy, Esq., for claimants, Charles W. Horner, Esq., for libellants. Thomas G. Mackie (examined for claimants by Mr. Ivy) having been duly sworn, deposes. Docked the brig "Ann Elizabeth" fifteen or sixteen months ago. She was put in dock because she was leaking. We repaired her as it was necessary to do; made the repairs requested by the captain. We found about two 3-8 of inch holes in her bottom, one about three streaks from the starboard plank next to the keel, and the other one I can't remember where exactly, but it was a little higher up. It was in February, 1853, that we made the repairs. The vessel was strained: the bulks were started; we caulked several of them; water was running out of them after the water had been pumped out of the dock. We plugged up the worm-holes and caulked the butts. We tried the hood-ends forward, and found that they would take about a thread of oakum.

When we examine a vessel, we examine the butts first, then the hood-ends, and from these we can tell if a vessel has been strained. There were no other holes than the two worm-holes plugged up that I know of. I saw no other worm-holes in her. We put no other repairs on her. The vessel was a stout, stanch sea vessel when we let her out of dock; she was a new vessel. We didn't find any of the butts split.

Cross-examined for Libellants by Mr. Horner.

After the water was pumped out of the dock, water ran out of one of the worm-holes, the one below the water-line. It would have run out of the other, probably, if there had been water high up enough in her. One of the inspectors, Mr. Swain, went over there and examined her; he went round with me. The captain was there at the time. He was satisfied that the worm-holes were partially the cause of her leaking, and that the straining of the vessel was the other cause. She was only one day in dock. Our bill for repairs was very trifling, the whole amount, including dockage, was over $100, possibly $200. The dockage of the brig was the most considerable item. She was leaking at the time we got her into dock: she was not leaking badly, however; she might have made probably about eight inches of water during twelve hours. A vessel will make more water in a rough sea, than in still water. Muddy water sucks in the leaks and stops them. A vessel will leak a great deal more in a gale of wind, than in still weather. I followed the sea myself for two years, and have been on it a good many times since.

Direct resumed.

The uppermost worm-hole was about between the eight and nine feet water-mark. Almost any vessel will strain more or less in a gale of wind. I have been in a new tight vessel, which after straining some time began to leak. The strainage will take place whether the vessel is new or old. The leakage will cease more or less from the throwing over of cargo, or abatement in the weather. When a vessel is heavy sea, she is apt from straining to open her seams, but more her butts and plank ends. She was laying near the dock some twelve hours before she was put in. I didn't see them pumping her, and saw but very little water in her. I took notice that the "Ann Elizabeth," had two pumps in her; pumps are generally bored each about three-inch holes where the water comes out.

CHAS. G. MACKIE.

ROBT. M. LUSHER,
U. S. Commissioner.

Henry Thaten, for claimants, having been duly sworn and examined, deposes: I recollect the "Ann Elizabeth" being in Mr. Mackie's dock; it was in February, 1853. I was at the time foreman for Mr. Mackie. I examined the vessel. I can't say exactly what

the matter was, but there were two or three worm-holes. They were about three-eighths of an inch in size; might have been a little less. These holes were forward by the bow, one pretty near to the bottom about the third streak; the others eight to nine inches up somewhere about light water-mark. I got one of the men to make some white pine plugs, and had these holes plugged up. I noticed that the vessel was strained. One butt was started about midships, somewhere about the third or fourth streak. It was refastened and caulked. We took no planks off; put no new ones in; she was a new vessel. I saw no other worm-holes in her. I particularly overhauled both sides, forward and aft, and saw no others. The brig was perfectly light when we took her in dock. She was a tight, stanch, seaworthy vessel, when we let her out of dock. I didn't take any notice of the pumps of the brig. The depth between the ceiling, the bottom planks in such a vessel is about twelve inches. The brig had water in her when she came into dock. Unable to say how much. She was middling between sharp and flat; underneath rather round.

No cross-examination.

HENRY THATEN.

ROBT. M. LUSHER,
U. S. Commissioner.

George Clarke, for claimants, having been duly sworn and examined, deposes: The captain of the brig "Ann Elizabeth" applied to me to make out an average bond, which was made out and sent round to the consignees for their signatures, and most, if not all of them, signed it. It was sent to Mr. Rotchford, agent of the libellants, among others, and he was invited to sign it. I don't recollect whether he signed it or not, but he sent in his claim to me, and in adjusting the general average, I carried in his claim among others. I made out a copy of the general average, and sent it to Philadelphia. The statement of "general average" now before me, furnished by libellants' counsel and marked X, is a correct condensed copy of the original statement made by me.

I know that libellants' property on the brig was *not* insured in New Orleans, as I had a list of all the insurances here in her cargo. N. B. Mr. Ivy promises to produce the average bond spoken of above, if he can obtain it.

Cross-examined.

I have been adjuster of averages for nine years; am very familiar with the subject. In cases of jettison at sea, the captain of the vessel on arriving at his port of destination, is bound to *extend his protest*, and deliver what remains of his cargo, so as to find out what is thrown overboard, just as the captain did in this case, and then he has to pay only his pro rata of the contribution on the estimated value of the vessel and freight list, where the adjustment is made.

He then leaves everything to the adjuster. The reason why the whole general average in this case fell through was, because some of the underwriters in this city objected. The consignees became clamorous for their pay for goods thrown overboard. I did not complete the adjustment until the next voyage, when I did complete it at the request of the captain himself. The adjuster's fee has not been paid. I look to the captain for it. He has lost his vessel by shipwreck since, and has not returned here, or he would probably have paid me. The brig came in here consigned to O. Wickham, but on the following voyage, when the adjustment was completed, she was consigned to G. W. Hynson. I don't know that any of the parties have been paid for their losses, except that the captain told me, that he had paid some little bill here to avoid a lawsuit and seizure of the vessel, when he was going away on the second voyage. I think it was McCutcheon & Co. who were paid. In cases of general average, when the consignees refuse to sign the average bond, the agents of the vessel have the right to retain their goods, but the parties in interest are liable even when they don't sign. If a vessel is unseaworthy, and a general average contribution is made, the underwriters are bound to indemnify the assured, no matter how large or small the contribution may be.

GEORGE CLARK.

ROBT. M. LUSHER,
U. S. Commissioner.

United States of America.

Fifth Circuit and Eastern District of Louisiana, City of New Orleans, *ss.*

I, Robert M. Lusher, Commissioner duly appointed as aforesaid, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the witnesses were brought before me (on subpœnas) by the proctor of the claimants, and the libellants made no objections. I further certify, that the notification was made out and served on the libellants' or adverse parties' proctors to be present at the taking of the depositions, and to put interrogatories if he or they should think fit, and that due notification of the time and place of taking the said depositions was made out and served on said libellants' or adverse parties' proctors, who were at the time of taking said depositions within the said City of New Orleans, the place of taking the said depositions.

I further certify, that on this fourth day of April, A. D. 1854, I was attended by V. H. Ivy, Esq., for claimants, and by C. W. Horner, Esq., for libellants, and by the witnesses, Thomas G. Mackie, Henry Thaten, and George Clark, who are of sound mind and lawful age, and the said witnesses were by me carefully examined, and cautioned and sworn to testify the whole truth, and the

depositions hereinbefore appearing were by me reduced to writing in the presence of the witnesses, and after carefully reading the same to the witnesses, they subscribed the same in my. I have retained the said depositions in my possession for the purpose of sealing up, directing, and forwarding the same with my own hand to the Court for which the same was taken, with documents referred to by wit: Clark.

I further certify that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of the said civil cause named in the caption. In testimony whereof I have hereunto set my hand and seal at New Orleans, this 4th day of April, A. D. one thousand eight hundred and fifty-four.

[L. S.]

ROBT. M. LUSHER,
U. S. Commissioner in and for the Eastern District of Louisiana.

Commissioner's fee $10 30, paid by G. W. Hynson, secretary for claimants, April 7th, 1854.

3d April, Notices to attornies for libellants, .	$2 00	
Service (H. A. G. pd.), ...		$1 00
4 writs of subpœna for witnesses, . . .	1 30	
3 depositions, 22 folios, @ 20c. . . .	4 40	
3 oaths filing general average statement, . .	40	
Certifying deposits, 6 folios, @ 20c. . .	1 20	9 30
		$10 30

ROBT. M. LUSHER,
Commissioner.

Document referred to in Deposition of G. Clark, for Claimants, filed 6th April, 1854.

Abstracts of Statement of General Average.

Case of the Brig "Ann Elizabeth," Vance Master.

Sailed from Philadelphia on the 19th December, 1852; in the afternoon, came to anchor at Dupont's Powder House; 21st, got underway and proceeded to sea; 23d, fresh gales and squally with a heavy sea running, causing the vessel to labor and strain badly; at 12, single reefed foretopsail; 25th, commences same at 4 P. M., double reefed foretopsail and mainsail; at 9 P. M., the gale increasing, took in foresail, close-reefed topsail, and kept off before the wind, a tremendous heavy sea running, causing the brig to strain badly and shipping much water; 26th, the gale continued, vessel laboring and straining badly; 27th, more moderate, with a heavy sea running, causing the vessel to labor and strain badly; at 8 P. M. calm with squalls and a heavy sea, sounded the pumps, and found two feet

water in the hold; kept off before the sea, and turned all hands to the pumps; at 10 P. M. again sounded and found four feet water, when it was deemed necessary for the safety of all concerned to lighten the vessel, and accordingly commenced throwing over the deck load; after getting it over, again sounded and found the water was gaining; then commenced throwing over the under-deck cargo, consisting of powder, hollow-ware, spades, shovels, castings, &c.; at 3 A. M. founding we were gaining on the water, stopped throwing over, and turned all hands to the pumps; at 5 A. M. succeeded in freeing her; at 10 A. M. kept off on the course, being obliged to keep one pump going constantly. 28th, more moderate, let out reefs and made sail; latter part wind again increasing to a gale took in foresail, double-reefed mainsail, and close-reefed foretopsail, vessel leaking about four hundred strokes per hour. 29th, same; at 6 P. M. wind increasing, took in mainsail and maintopsail, and kept off before the sea, one pump going most of the time. 30th, more moderate, let out the reefs, and made sail, the sea; one pump going most of the time. *30th, more moderate, let out the reefs, and made sail, the sea* being smoother; found the leak decreased to 400 strokes per hour. After this proceeded on the passage with moderate winds and weather, with occasional squalls, *winds and weather, with occasional squalls;* leak about the same until the 16th January, on which day made South Point Light, and at 12 midnight came to anchor. 17th, was taken in tow by a steamer, bro't in over the Bar, and proceeded up the river. 19th, arrived at the City of New Orleans. During the whole passage the pumps were well attended to.

Charges and Expenses.

$12 00	R. Brenan, Notary Public. Noting and extending protest, &c., .		$12 00
130 62	B. Nautre & Co., for the following jettisons. 9 + 2, seven plate stoves; 20 + 3, seven plate stoves; 20 + 4, seven plate stoves, ...	118 75	
	Add ten per cent., .	11 87	
			130 62
50 00	Heron & Martin. For obtaining valuations of cargo, . . .		50 00
3 85	L. Sturtevant & Co. 1 keg nails, short, delivered, . . .	3 50	
	Add 10 per cent., .	35	
			3 85
54 28	M. B. McCutcheon & Co. 1974 bls. hollow-ware, lost, at 2½c., .	49 35	
	Add 10 per cent., .	4 93	
			54 28

$63 80	L. Bussac. 100 pairs fire-dogs, cost, ...	$58 00	
	Add 10 per cent., .	5 80	
			$63 80
2 75	Dyas & Co. R. & E., ½ doz. shovels, at $5, ...	2 50	
	Add 10 per cent., . .	25	
			2 75
63 25	C. T. Buddecke & Co. J. W., & 6 doz. shovels, at $9 54, . .	57 25	
	A. J. W., 1 port cover, . .	25	
	Add 10 per cent., . .	5 75	
			63 25
380 55	Carried forward, .		380 55
380 55	Amount brought forward, . .		380 55
198 00	C. T. Buddecke & Co. W. & B., 1½ doz. forks, at $4 50, . .	6 75	
	27½ doz. shovels and spades, at $6 30, ...	173 25	
		180 00	
	Add 10 per cent., .	18 00	
			198 00
98 01	C. T. Buddecke & Co. $\frac{P}{C}$ 13½ doz. shovels and spades, at $6 60, .	89 10	
	Add 10 per cent., . .	8 91	
			98 01
317 36	C. C. Gaines. 596 pairs castings, 7609 lbs., ...	335 86	
	Less freight, . .	18 50	
			317 36
5676 54	P. Rotchford. Value of 1646 kegs powder, ...	5936 54	
	Less freight, . .	260 00	
			5676 54
	Charges and Expenses.		
22 27	R. Richards. 27 pairs castings, short, ...	20 25	
	Add 10 per cent., . .	2 02	
			22 27
402 64	F. F. Folger. E. 31 doz. spades and shovels, at $9, . . .	279 00	

	3516 lbs. hollow-ware, at 4 c., .		$140 64	
			419 64	
	Less freight on same, .		17 00	
				$402 64
$10 00	R. Swain. Surveying and appraisal of vessel, ...		10 00	10 00
10 00	Average bond, ...		10 00	10 00
125 00	This settlement, ...		125 00	125 00
7240 37	Carried forward, .			7240 37
7240 37	Amount brought forward,	7240 37		
332 10	Freight on cargo jettisoned.			
	M. B. McCutcheon, . .		8 75	
	R. Richards, ...		1 50	
	C. C. Gaines, ...		18 50	
	L. Bussac, ...		4 62	
	B. Nautre & Co., . . .		8 70	
	L. Sturtevant & Co., . .		10	
	Dyas & Co., ...		13	
	C. T. Buddecke & Co., . .		12 80	
	P. Rotchford, ...		260 00	
	F. F. Folger, ...		17 00	
				332 10
7572 47				7572 47
378 62	Commission on collecting, &c., 5 per cent.,			378 62
$7951 09				$7951 09

Apportionment.

	Values.	General Average.	
Sundry Consignees, . .		$72,725 62	$6,065 09
P. Rotchford,			
Amount powder received,	$1,238 21		
Made good, . . .	5,676 54		
		6,914 75	576 64
Freight received, . .	1,468 00		
Made good, . . .	332 10		
	1,800 10		
Less $\frac{1}{3}$, ...	600 10		
		1,200 00	100 08
Vessel valued at . .		14,500 00	1,209 28
$8\frac{3396}{10000}$ per cent., . .		$95,340 37	$7,951 09

Settlement.

	Dr.	Cr.	Pay.	Receive.
Sundry Consignees.				
Pay general average as per apportionment, .			$5,190 62	
C. T. Buddecke & Co., general average on				
Lehman & Co., .	$49 86			
$\frac{P}{C}$AD	17 27			
HGB & Co.	3 47			
M	20 36			
JW	62 54			
Wood, Christy & Co., .	9 42			
W. & B., . . .	292 43			
Wilson & Bro., . .	46 29			
Receive for jettison on	29 04			
$\frac{P}{C}$JW		$98 01		
W & B		63 25		
		198 00		
	$530 68	$359 26	$171 42	
L. Bussac.				
Pay general average, .	$5 32			
Receive for jettison, .		$63 80		$58 48
Dyas & Co.,				
Pay general average, K. & E., . . .	8 86			
Receive for jettison, .	33 27	2 75		
	$42 13	$2 75	39 38	
F. F. Folger,				
Pay general average, .	90 07			
Receive for jettison, .		402 64		312 57
C. C. Saines,				
Pay general average, .	90 21			
Receive for jettison, .		317 36		227 15
W. B. McCutcheon & Co.,				
Pay general average, .	12 25			
Receive for jettison, .		54 28		42 03
Carry forward, . .			5,401 42	640 23
Amt. brought forward,			5,401 42	640 23
B. Nautrie & Co.				
Pay general average, .	11 90			
Receive for jettison, .		130 62		118 72

R. Richards.				
Pay general average, .	$20 60			
Receive for jettison, .		$22 27		$1 67
L. Sturtevant & Co.,				
Pay general average, .	71 31			
Receive for jettison, .		3 85	67 46	
P. Rotchford.				
Pay general average, .	576 64			
Receive for jettison, .		5,676 54		5,099 90
Concerned in Vessel,				
By general average on vessel, . . .	1209 28			
Pay general average on freight, . . .	100 08			
Receive freight short, .		332 10		
	$1309 36	$332 10	977 26	
Bills and expenses, .				585 62
			$6,446 14	$6,446 14

WM. H. BIRD,
GEORGE CLARK, } Adjusters.

NEW ORLEANS, June 1st, 1853.

Opinion and Judgment of Court, rendered 4th May, 1854.

E. I. DUPONT DE NEMOURS
v.
BRIG "ANN ELIZABETH."

United States District Court.

The regular shipment of the powder in controversy in this case, is fully proved by the bills of lading introduced in evidence. The non-delivery of the powder is admitted, and it is alleged in defence that it was thrown overboard in the course of the voyage. There is no evidence to show the fact of the jettison, or the circumstances under which it was made, except the protest of the master. In the case of Merriman *v.* The May Queen, manuscript, p. 10, I have already had occasion to show that such a protest cannot be received as evidence, in favor of the master or owners in a case before the present. With whatever formalities drawn up, says Abbotson, Shipping, "it cannot be received as evidence in our courts, for the master or his owners, but it may be evidence against him and them, and he should take care to supply from the log-book his own recollection and that of the mate or trustworthy mariners, true and faithful instructors for its preparation."

By Lord Stowell, a protest was in the case of the Betsy Gaines (2 Haggard), rejected as *res inter alias acta.*

Apart from these authorities, it is apparent that such an instrument could not, upon the general principles of evidence, be received to guide the judgment of the Court in a case like this. The statement it contains is entirely ex parte. The adverse party can never exercise the unvaluable right of cross-examination, unless the witness or witnesses, who make the statement, should be brought before the Court or examined under a commission.

There are cases in which protests have been admitted, but it is in those in which the proceedings appear to have been by summary petition, and where the case has been wholly heard and decided on affidavits, including those of the parties themselves. And it will be found, that the cases in the High Court of Admiralty in England, in which the protest of the master has been admitted as evidence in behalf of his owners, were of this description; and that it would be deemed inadmissible as such in a proceeding by plea and proof, is sufficiently clear from the remarks of Judge Conkling on the subject. (Conkling, Admiralty, 688–9.)

The difference which prevails in the High Court of Admiralty in England, between what are known as summary proceedings by act on petition, and the more solemn form of proceeding by plea and proof, is well understood in that country, but is rarely if ever recognized in the admiralty tribunals of this country. All our cases are determined upon plea and proof, and it is in such cases that the protest cannot be admitted as evidence, except so far as to show that such a protest has been made. (3 Hagg. 340, 342; W. Rob. 169.)

If the protest in this case be rejected, there is no evidence to show the jettison, or the circumstances under which it was made. These circumstances, in a case as strongly contested as this, should be shown by evidence which would leave no doubt upon the mind of the Court. Without such evidence, the testimony of the witnesses who examined the vessel in dock can avail nothing in exempting that vessel from the usual liability under a contract of affreightment.

This view of the case precludes the necessity of examining the other points which were discussed by the proctors before the Court.

I must, therefore, adhere to the opinion previously expressed, and decree that the libellants do recover the value of the powder as claimed in their libel, viz., the sum of $5,665 59, and 5 per cent. interest, from Jan. 15th, 1853, with costs of suit.

E. I. DUPONT DE NEMOURS & Co.
v.
THE BRIG "ANN ELIZABETH."

February Term, 1854. Stated Session. Thursday, May 4th, 1854.
Present: Hon. T. H. McCaleb, U. S. Judge.

Final Decree.

A rehearing having been granted herein, and the Court having carefully reviewed the evidence and argument of counsel, delivered its opinion and judgment thereon in writing, and being satisfied that the judgment and decree of the Court heretofore rendered on the 26th January, 1854, is correct, It is now accordingly ordered, adjudged, and decreed, that the libellants recover of and from the *libellants recover of and from the* owners and surety of the brig "Ann Elizabeth," the full sum of five thousand six hundred and sixty-five $\frac{55}{100}$ dollars, with five per cent. interest thereon, from the 15th of January 1853, till paid, and costs of suit to be taxed by the Clerk.

In the Honorable, the District Court of the United States, for the Eastern District of Louisiana.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG ANN ELIZABETH.

Petition of Appeal.

Filed 9th May, 1854.

The petition of Capt. Vance, for himself and owners of brig Ann Elizabeth, and the sureties, herein respectfully represent, that they are dissatisfied with the judgment herein rendered, and pray that they may be allowed to appeal from the same to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, on their giving bond as by law required.

IVY,
Proctor for Claimants.

United States District Court. In Admiralty.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG ANN ELIZABETH.

Appeal Bond.

Filed 15th May, 1854.

Know all men by these presents, that we, John Vance, Martin Thompson, Calvin Taggart, John T. Gause, C. Ogden, and McDonald and Laughlin, owners of the brig "Ann Elizabeth," whereof the said John Vance is master and claimant, appearing herein by V. H. Ivy, their proctor, and Geo. W. Hynson, of New Orleans, as principals, and Wm. H. McLellan, and George W. Hynson, of said city,

as sureties, are held and firmly bound, jointly and severally, unto E. I. Dupont de Nemours & Co., of Wilmington, Delaware, libellants, in the sum of $8,500, eight thousand five hundred dollars, lawful money of the United States of America, to be paid to the said E. I. Dupont de Nemours and Co., libellants, their heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the thirteenth day of May, in the year of our Lord eighteen hundred and fifty-four.

Whereas the said John Vance and others, owners of the said Brig "Ann Elizabeth," and claimants and respondents in a suit in Admiralty prosecuted in the District Court of the United States for the Eastern District of Louisiana, entitled, E. I. Dupont de Nemours & Co. *v.* the brig "Ann Elizabeth," No. 6875, have this day presented a petition to the honorable the District Court of the United States, in and for the Eastern District of Louisiana, praying an appeal from the decree of said District Court, in the said case, bearing date the fourth day of May, A. D. 1854, said appeal returnable to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

Now the condition of the above obligation is, that we, the above-bounden John Vance and other owners of the brig, and Geo. W. Hynson, and Wm. H. McLellan, their sureties, will well and truly pay to the said libellants, E. I. Dupont de Nemours and Co., appellees and defendants in said appeal, all such damages, costs, and expenses as they may recover against us in case it should be decided that the said appeal was wrongfully obtained.

JOHN VANCE,
Master and Owner of Brig "Ann Elizabeth."
By V. H. IVY.
GEO. W. HYNSON, [L. S.]
WM. H. McLELLAN. [L. S.]

Signed, sealed, and delivered in presence of
ROBT. M. LUSHER.

Qualification of Surety on Appeal Bond.

Wm. H. McLellan, surety on the appeal bond in this case, being duly sworn, deposes and says, that he is worth eight thousand dollars over and above all his debts and liabilities.

WM. H. McLELLAN.

NEW ORLEANS, 20th May, 1854.

Sworn to and subscribed at New Orleans, this 20th day of May, 1854, before

ROBT. M. LUSHER,
U. S. Commissioner in said Eastern District of Louisiana.

February Term, 1854. Stated Sessions. Saturday, May 13th, 1854.

E. I. DUPONT DE NEMOURS & Co.
v.
BRIG "ANN ELIZABETH."

Motion and Order of Appeal.

On motion of V. H. Ivy, Esq., proctor for claimants, and on their petition of appeal of record, and on an appeal bond in the sum of $8,500, with Geo. W. Hynson and William H. McLellan, of New Orleans, as sureties,

It is ordered by the Court that said claimants have and be allowed an appeal from the decree of this Court in this case, returnable to the next term of the Circuit Court of the United States for this District.

United States District Court, Eastern District of Louisiana, City of New Orleans.

I, N. R. Jennings, Clerk of said Court, do hereby certify that the foregoing 67 pages of manuscript contain and form a true, faithful, correct, and complete transcript of all the proceedings, process, pleadings, documents, and other matters on file and of record in a certain cause in Admiralty, entitled, as hereinbefore shown, E. I. Dupont de Nemours and Co. versus the Brig "Ann Elizabeth," No. 6875 of the general docket of said Court.

[SEAL.] In testimony whereof I hereto set my hand and the seal of said Court, at New Orleans, this 9th day of October, A. D. one thousand eight hundred and fifty-four, and seventy-ninth year of American Independence.

N. R. JENNINGS,
Clerk.

Attest: By ROBT. M. LUSHER,
Deputy Clerk.

The President of the United States of America, to E. I. Dupont de Nemours & Co., libellants, by Philip Rotchford, of New Orleans, Agent, and greeting.

You are hereby cited and admonished to be and appear at a Circuit Court of the United States, to be holden at the City of New Orleans, on the first Monday of November next, pursuant to an order of appeal, granted on the 13th day of May, 1854, by the District Court of the United States, in and for the Eastern District of Louisiana, in a certain cause in Admiralty, entitled, E. I. Dupont de Nemours & Co. *v.* Brig "Ann Elizabeth," wherein the claimants and surety of said brig are appellants, and you are appellees, to show

cause, if any there be, why the judgment rendered against the appellants as in the said order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness hereto my hand, and the seal of the said [SEAL.] Court, at the City of New Orleans, this 9th day of September, A. D. 1854.

THEO. H. McCALEB,
Judge of the U. S. District Court, E. D. of La.

Attest: ROBT. M. LUSHER,
Deputy Clerk.

Marshal's Return.

Received Sept. 9th, 1854, and on the same day served copy of the within citation of appeal on P. Rotchford, agent of E. I. Dupont de Nemours, in person, in the City of New Orleans, and returned same day.

EMILE MARY,
Deputy Marshal.

PROCEEDINGS IN UNITED STATES CIRCUIT COURT.

Minutes. Nov. 1854. November Term, 1854. New Orleans, Tuesday, 14th Present, Hon. J. A. Campbell, presiding.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH," JNO. VANCE & als.

Order of Continuance.

On motion of V. H. Ivy, of counsel for appellants, and on showing to the Court that a commission issued by appellants to obtain certain material testimony, has not yet been returned, but is daily expected, it is ordered that this cause be put at the foot of the appeal docket.

Minutes. Nov. 1854. November Term, 1854. New Orleans, Wednesday, 15 Present, Hon. J. A. Campbell, presiding.

E. I. DUPONT DE NEMOURS
v.
Brig "ANN ELIZABETH," JNO. VANCE & als.

Continuance.

This cause having been reached on the docket, was called for hearing, and the parties not being present, not represented, it was ordered that a continuance to the next term be entered; the same to be set aside, should the depositions, for the absence of which a continuance

was applied for on yesterday, arrive in time for a hearing at the present term.

Minutes. April Term, 1855. Present: Hon. J. A. Campbell, Presiding Judge, New Orleans, Tuesday, April 24th, 1855.

E. I. DUPONT DE NEMOURS
v.
BRIG "ANN ELIZABETH," JOHN VANCE & als.

Submission.

This cause was argued by Charles Horner, Esq., for libellants, and by Messrs. Ivy and Duncan for the respondents, and was thereupon submitted to the Court and taken under advisement.

Deposition of Charles P. Marshman.

Taken by Consent.

Charles P. Marshman, being duly sworn, says: I do not know the plaintiff herein. I do not know the owners of the Brig "Ann Elizabeth." I know Vance, who was master of said brig. I know that when vessels, whether new or old, when in heavy weather, will strain and labor; and when they do, they will leak; and further, when they are relieved, either by throwing over cargo or by abatement of weather, they cease to leak. Sometimes they do not cease to leak. This heavy weather is apt to open seams or start a butt. If I had a vessel which leaked more than the pumps would free in heavy weather, I would suppose that she was laboring and opening seams, and perhaps starting butts, and I would throw over cargo for the preservation of life and property. It is universally the case where vessels do make more water than the pumps will free in heavy weather, that we make a jettison to relieve her. I have been going to sea for thirty-four years, and have been master of a vessel for twenty-five years; and the above is my experience. Rolling and pitching in heavy weather must always make a vessel open her seams, and perhaps start a butt which will make her leak greatly during such weather, and if the weather abates or cargo is thrown over, it relieves her.

I never knew in all my experience, original worm-holes to get the better of pumps. I have heard of old vessels being worm-eaten to such a degree as to get the better of the pumps. I have never heard of a vessel on her first or second voyage to be worm-eaten to such a degree as to get the better of her pumps. If I should go out of port in a new or old vessel and she was kept ordinarily free for some days, and I experienced heavy weather, and during such heavy weather she leaked greatly, and upon the weather abating or upon cargo being thrown overboard, and she ceased to leak so much, I should lay it to the straining which the vessel did undergo. If I

should go out of port in a vessel and she kept ordinarily free for some days, and heavy weather succeeding, and I could not keep her free, I would throw over cargo.

That Charles P. Foster, who has heard this read, testifies to the same. He is not so old and has not been to sea so long as the witness.

Cross-examined.

I hail from Philadelphia. I am in Barker & Stetson's employ. I am on the bark "Jane C. Hand." I remember the circumstances connected with the Brig "Ann Elizabeth" when they took place. None of the owners of my vessel are interested in this brig, or in this suit to my knowledge.

Would you consider a new brig with two worm-holes in her bottom three-eighths of an inch in diameter, seaworthy?

He says: I would not go to sea in her if I knew it; that is, I could not think her seaworthy, if I knew it, and would not go to sea in her. I never made but one jettison; and that was of a deck load only; it was on board the "Thomas Walton."

I have had two general averages. One was a voyage up the Mediterranean, and another on a voyage from the West Indies. In cases of general average, when the ship arrives at her port of destination, it is usual for the captain to note and extend his protest; he must have his average bond made out; have it signed by consignees; and have the statement of general average prepared as soon as possible before leaving the port.

Cross-Examination of Chas. P. Foster.

I am thirty-three years old, and hail from Philadelphia; I am captain of Brig "David S. Brown;" I knew there was such a vessel as the Brig "Ann Elizabeth."

Would you consider a new brig, with two worm-holes in her bottom, $\frac{3}{8}$ of an inch in diameter, seaworthy?

He says, I would not go to sea in her if I knew it. I went in one schooner, called the Kensington, for two years, that had a butt bolt hole right under the larboard fore chains; it was under the light water line. This is my first voyage in the "David S. Brown;" I have been captain of a vessel for the past eight years. I think I have made jettisons of cargo in three instances. One of them was in the said schooner "Kensington;" but after the butt hole had been stopped; the other two were on the schooner "Tuscarora;" one was on a voyage from Charleston to New York; one from Savannah to Philadelphia, and from Wilmington, N. C., to New York. The last one involved the most damage, for I lost both vessel and cargo. I do not think that any of these jettisons were made at night. In the last instance we began to throw overboard in the morning, and continued until after four o'clock in the afternoon.

I concur in Capt. Marshman's testimony, as to the general average matters.

CHAS. P. FOSTER,
C. P. MARSHMAN.

Affidavits waived, N. O. 23 April, 1855.

DURANT & HORNER.

Commission and Depositions of Thos. Snee, Thos. J. Dohan, and Thos. Vance.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH," and
JNO. VANCE & als., claimants, appellants.
} No. 2390.

Circuit Court of the United States, for the Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, to William Henry Rawle, Esq., Commissioner, Philadelphia, State of Pennsylvania: Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and cause to come before you Michael Snee, Thomas Dohan, and Smith & als., and them duly examine on oath, touching and concerning certain matters and things in a case now depending in the said Court, wherein E. I. Dupont de Nemours & Co., plaintiffs, and Brig "Ann Elizabeth" & Co., John Vance, et als., claimants, appellants (No. 2390 of the Docket), defendants; and the same examinations so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this Court without delay, to be read in evidence on the trial of said cause, and send also this writ. Witness the Honorable R. B. Taney, Chief Justice of the Supreme Court of the United States, at the City of New Orleans, this 30th day of March, Anno Domini 1855, and the 79th year of the Independence of the United States of America.

[SEAL.]

J. W. GURLEY,
Clerk.
Per F. C. LAVILLE,
Deputy Clerk.

United States Circuit Court, Louisiana.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH," &c.

Interrogatories to be propounded to Snee, Dohan, Smith, and others.

Interrogatory First. Did you know the Brig "Ann Elizabeth," Vance, master, in December, 1852?

Second. Did she sail from Philadelphia some time in December, 1852, on a voyage to New Orleans, and were you on board of her on that voyage? If so, state what kind of a vessel she was, new or old, strong or weak, seaworthy or unseaworthy, whether her pumps were good or not?

Third. Do you know what kind of weather she had on that voyage? If yea, state whether it was calm or boisterous during said voyage.

Fourth. Was or not the weather very heavy during the 23d, 24th, 25th, 26th, 27th, 28th, 29th, and 30th days of December, 1852?

Fifth. If yea, state whether the brig labored and strained badly or not, in this heavy weather, and did she leak, and how much did she leak, and what was the cause of her leaking?

Sixth. Was there any cargo thrown over on that voyage, and why was it thrown over?

Seventh. Did the vessel leak badly at or shortly before the cargo was thrown over?

Eighth. What kind of weather was there at the time the cargo was thrown over?

Ninth. Were the pumps worked faithfully to keep her free?

Tenth. Did you get her free after the cargo was thrown over?

Eleventh. Had the water gained upon you before the cargo was thrown over?

Twelfth. Was the vessel eased by throwing over her cargo?

Thirteenth. Did she labor as much after the cargo was thrown over as before?

Fourteenth. Was the vessel managed carefully and skilfuly during that voyage, and during the heavy weather?

Fifteenth. Do you know if the brig had any worm-holes in her? and if she had, were they sufficient to cause her to leak so as to endanger her?

Sixteenth. State generally all you know of benefit to the vessel.

Specially objecting that any other witnesses should be examined than those mentioned in the caption, and to all the foregoing interrogatories as being leading, and reserving all objections to the want of diligence on the part of claimants in obtaining their testimony, the counsel for libellants propound the following cross-interrogatories.

First. What is your full name, your age, occupation, and present place of residence? Where were you born? How long have you been in this country? Are you a citizen of the United States?

Second. Were you one of the passengers or crew of the Brig "Ann Elizabeth?" If yea, what was the captain's name? What was the mate's? What was the second mate's? Who composed the crew? When did you arrive in New Orleans? How long after the brig's arrival in New Orleans did you leave her? How was she leaking then? How often were the pumps tried at that time, and what amount of pumping was there required to keep the brig clear?

Third. Was any cargo thrown overboard during the voyage to New Orleans? If yea, at what time of day was it? Who gave the orders? What did the captain say to you? Why were the goods thrown overboard? Did you know the reason why they were thrown overboard? Did the mate or the captain know? Why did the vessel leak? How many strokes of the pumps per hour were required to keep the vessel free before the jettison? How many afterwards?

Fourth. Was the brig coppered? Had she any holes in her hull which in water? State all you know on this point. Do you consider a new brig seaworthy with one or more worm-holes in her hull? And if yea, will you please give your reasons for so thinking?

Fifth. On what day, and at what hour, during the voyage, was it first discovered that the brig leaked? How many feet of water were in the hold at this time? How was the weather at this time?

Sixth. Did you sign the protest of the brig? If yea, where did you sign it and who was present at the time?

DURANT & HORNER,
Proctors for Claimants,

Depositions, &c.

Depositions of witnesses produced, sworn and examined, by virtue of the annexed commission, on the seventh day of April, in the year of our Lord one thousand eight hundred and fifty-five, at the office of William Henry Rawle, No. 129 South Third Street, in the City of Philadelphia, and State of Pennsylvania, before me, the said William Henry Rawle, the commissioner named in the annexed commission, and also the commissioner for the State of Louisiana, to take testimony in the State of Pennsylvania, in a certain cause now depending in the Circuit Court of the United States, for the Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, wherein E. I. Dupont de Nemours & Co., are plaintiffs, and the Brig "Ann Elizabeth," John Vance and others claimants, defendant.

Michael Snee, a witness produced, sworn, and examined, answers as follows, to the interrogatories propounded to him.

1. To the first interrogatory:

I did.

2. To the second interrogatory he answers:

The "Ann Elizabeth" did sail from Philadelphia some time in December, 1852, on a voyage to New Orleans, and I was on board of her on that voyage. She was a new vessel, seemed to be strong, perfectly seaworthy, and her pumps were in good order. They might not, perhaps, hove up as much water as those in a large ship, but according to her size they were perfectly good; they were light and hove up the water very well.

3. To the third interrogatory he answers:

I do know what kind of weather the brig had on that voyage. It

was very coarse weather. She frequently experienced gales of wind and heavy weather during the voyage.

4. To the fourth interrogatory he answers:

As to the precise date, I will not pretend to speak, for I kept no journal of dates; but I recollect that we left Philadelphia on a Sunday morning, about a week before Christmas, and on the next Sunday at eight o'clock P.M. we got orders to pump ship; we pumped the water out freely for a long time, and then had her sounded, and found much water in her, about two feet of water; two hours after we sounded again, and found near four feet of water; some time after, the captain ordered us to keep her before the wind, she was rolling so badly; we did so. Thomas Vance (the captain's father), and all the others who could be spared, worked at the pumps, while the ship's company hove over the cargo. I could not now say for how long there had been heavy weather before that, nor how long after; but the heavy weather lasted several days; at this lapse of time I cannot say whether these days were before or after this night.

MICHAEL SNEE.

5. To the fifth interrogatory he answers:

The brig labored and strained very badly during this heavy weather, and leaked badly, as I have said. I have already said, so far as I can, how much she leaked. I cannot pretend to say what was the cause of her leaking, as I left the vessel when she arrived at New Orleans; the only cause to which I could attribute the leak would be stress of weather.

6. To the sixth interrogatory he answers:

There was a good deal of the cargo thrown overboard on that voyage, in order to save life and the vessel; she labored so that it was absolutely necessary, and she lightened almost immediately afterwards; we threw over hardware, coals, oil, and gunpowder, about thirteen hundred kegs of the latter.

7. To the seventh interrogatory he answers:

The brig certainly did leak very badly just before the cargo was thrown over.

8. To the eighth interrogatory he answers:

The weather was very coarse at the time—blowing very hard and a heavy sea rolling. I believe it rained, but we gave no count to that.

9. To the ninth interrogatory he answers:

The pumps worked very well. They neither blowed nor choked, to my recollection.

10. To the tenth interrogatory he answers:

We got her free gradually as we threw the cargo over, and stopped throwing the cargo over as we found we were gaining on her.

11. To the eleventh interrogatory he answers:

The water had very much gained on her before then.

12. To the twelfth interrogatory he answers:

The vessel was not only eased but saved, by throwing over the cargo.

13. To the thirteenth interrogatory he answers:

She did not; she gradually eased off.

14. To the fourteenth inventory he answers:

She was, according to the best of my knowledge.

15. To the fifteenth inventory he answers:

I know nothing of the matter here inquired of.

16. To the sixteenth interrogatory he answers:

I have already done so, as fully as I can at this lapse of time.

To the first cross-interrogatory he answers:

My full name is Michael Snee; I am about thirty-two years old; I am a painter, a ship-painter, and now reside in Turner Street, Philadelphia; I was born in Ireland, and have been here about ten years, and am a citizen of the United States.

2. To the second cross-interrogatory he answers:

I was one of the crew. The captain's name was John Vance.

MICHAEL SNEE.

The first mate's name was James Novdan, or Nowdan, or Newton: I believe he is now dead; the second mate's name was Holms; the crew were Parker, and Smith, and Conner; then there was a cook and steward, and a man and boy besides; their names I don't know. I do not know when I arrived at New Orleans, but we had I think from thirty to thirty-two days' passage, and we sailed about a week before Christmas; I left the next morning after she arrived in New Orleans. She was not leaking so badly then. After we hove over the cargo, to clear the vessel, we generally had two hours out of four to pump, and when the weather was bad, rather more—we had to pump then almost all the time.

3. To the third cross-interrogatory he answers:

I have already annexed much of this question. The cargo was thrown overboard about midnight; the Captain gave the orders, in connection with the mate and second mate. I do not recollect any precise words said, but their result was that we were to get the boats ready, in case we would have to abandon the ship, and meanwhile try to ease her by casting over the cargo, while the passengers worked at the pumps; the cargo was heaved over for the safety of life and property. I knew that to be the reason before they were thrown overboard; I presume the mate and captain knew also. I do not know why the vessel leaked, unless it was from stress of weather; I cannot, of my own knowledge, answer as to the strokes of the pump here inquired of.

4. To the fourth cross-interrogatory he answers:

I do not know whether she was coppered or not; I do not know whether she had holes to let in the water or not. If there be large worm-holes in a new ship it might render her unseaworthy, otherwise, if the worm-holes are small; it all depends upon their size. She was perfectly seaworthy when we sailed, and continued so till this spell of coarse weather.

5. To the fifth cross-interrogatory he answers:

I have already answered this interrogatory, except as to the hour of the leak. It was about eight o'clock in the evening.

6. To the sixth cross-interrogatory he answers:

I signed the protest of the brig. It was at a notary public's office, in New Orleans, and the captain, and mate, and Conner were present. I don't remember about Smith being there or not.

MICHAEL SNEE.

Sworn and subscribed before me, this seventh day of April, A. D. 1855.

WILLIAM HENRY RAWLE,
Commissioner.

Thomas J. Dohan, a witness produced, sworn and examined, answers as follows to the interrogatories propounded to him.

1. To the first interrogatory he answers:

I did.

2. To the second interrogatory he answers:

She did; and I was on board as a cabin passenger; she was a new vessel, I think her first trip; a strong and seaworthy ship when we sailed; her pumps were in good order.

THOMAS J. DOHAN.

3. To the third interrogatory he answers:

She had very bad weather; very boisterous, heavy gales, with rain, and heavy weather generally.

4. To the fourth interrogatory he answers:

I don't recollect exact dates; but we sailed about a week before Christmas, and about Christmas the heavy weather began; it began two nights before Christmas, and lasted nearly a week.

5. To the fifth interrogatory he answers:

She did strain and leak very badly; the cause I don't know; she labored and strained badly, and leaked very hard. There was four foot of water in the hold when I was set to pump. It afterwards gained half a foot; it did not gain over that.

6. To the sixth interrogatory he answers:

There was, in order to ease the vessel and keep us all alive.

7. To the seventh interrogatory he answers:

She did.

8. To the eighth interrogatory he answers:

The weather was very bad; could hardly have been worse.

9. To the ninth interrogatory he answers:
They were very faithfully.
10. To the tenth inventory he answers:
He did.
11. To the eleventh interrogatory he answers:
It had very much gained before the cargo was cast over.
12. To the twelfth interrogatory he answers:
The vessel was not only eased, but eased by so doing.
13. To the thirteenth interrogatory he answers:
No; not near so much; about 3 A. M. orders were given to stop casting over, as the vessel was easing.
14. To the fourteenth interrogatory he answers:
She was, to the best of my knowledge, very carefully managed.
15. To the fifteenth interrogatory he answers:
I know nothing at all about this.
16. To the sixteenth interrogatory he answers:
I have already done so; I know I had to work hard every day and night, from that time till I got to New Orleans.

To the cross-interrogatories he answers as follows.
1. To the first cross-interrogatory he answers:
My full name is Thomas J. Dohan; I am thirty-one years old; I have been a grocer, and am not now in business; I now reside in West Philadelphia. I was born in Ireland, and have been in this country about twenty-two years, and am a citizen of the United States.
2. To the second cross-interrogatory he answers:
I was one of the passengers. The captain's name was John Vance; first mate Houton; second mate, Holmes; the crew I don't know. Parker, I think was one. We were thirty-two days out, and arrived at New Orleans at the end of that time. I don't know the day. I left the brig the same day as her arrival. I don't know how much she leaked then; we had to pump all the time, from the time the leak first broke out till we arrived in New Orleans. I can't tell the average depth of water in the hold. I just pumped my time when it came.
3. To the third cross-interrogatory he answers:
It was about midnight, a night or two before Christmas. The captain gave the orders by telling all hands to heave over the cargo. They were hove over to save the ship. I knew the reason before then; it was obvious; I presume the mate and captain knew; I do not know why she leaked; I do not know about the strokes of the pump.
4. To the fourth cross-interrogatory he answers:
I do not know whether she was coppered; I don't know about any holes in her. I know nothing about a vessel's seaworthiness, or the reverse, from worm-holes.
5. To the fifth cross-interrogatory he answers: I cannot answer

this more particularly than I have done already, except that the leak began about 8 o'clock P.M., after we had been about a week out.

6. To the sixth cross-interrogatory he answers: I believe not.

THOMAS J. DOHAN.

Sworn and subscribed before me this seventh day of April, A. D. 1855.

WM. HENRY RAWLE,
Commissioner.

Thomas Vance being duly sworn, answers as follows to the interrogatories propounded to him.

1. To the first interrogatory he answers:

I did.

2. To the second interrogatory he answers:

She did; and I was on board on a pleasure trip. She was a fine new brig, built of white oak, copper fastened, a strong vessel and seaworthy; her pumps were new and good.

3. To the third interrogatory he answers:

She had, after the first week, very hard weather—boisterous and gales of wind—at times it would somewhat moderate, but the winds was head winds nearly all the time.

4. To the fourth interrogatory he answers:

I do not recollect the days of the month particularly, but I think we sailed a week before Christmas, as near as I can recollect, we sailed on the 18th of December. On the sixth night out she was perfectly light and stanch, when she sprang and leak, a heavy sea on, the wind blowing hard and it raining, though the rain makes no matter. The weather was bad for perhaps a week after. I cannot recollect this very particularly, for people at sea, especially when working hard, as we were, don't much notice the weather after so long a time, unless it is something very remarkable.

5. To the fifth interrogatory he answers:

She labored and strained very badly in this weather. She was on her beam ends when she sprang the leak. The water was on the deck on her lee side, she was so much covered over. She was close hauled at the time. She was, to all appearance, perfectly light till that night—that is, the sixth night out, when she sprang aleak and leaked very badly; very fast—a good deal too fast for me, for I thought it would be my last night, so imminent was the danger. The pumps were at once set to work, and it was found they could not clear her, and then they sounded the pumps, and found two feet water in the hold. Still they continued to pump for another hour, and then sounded again, and found the water increased to three feet, both pumps going all the time between the soundings. Still they went on to pump, changing hands as fast as they were exhausted, for it was hard work. They sounded again an hour after, and found four feet of water in the hold, and then we all felt as if death were look-

ing us in the face. This was between 10 and 11 o'clock. The wind was blowing hard, and the heavy sea on, and the water inside make her labor and roll. She had no spirit left in her, and shipped water at every roll. We were up to our knees in it, and the water was all over the deck. Then it was that, after consultation, the captain gave orders to throw over the cargo.

6. To the sixth interrogatory he answers:

There was, as I was beginning to state. The captain's orders were obeyed, and the deck load was first cast off; coal, oil, iron-castings, in the forward house, and gunpowder in the after-house; the steerage cabin. This was done to save the vessel and the lives of those on board if possible, but it seemed doubtful even then.

7. To the seventh interrogatory he answers:

She did very badly.

8. To the eighth interrogatory he answers:

I have already answered this. The weather was very bad.

9. To the ninth interrogatory he answers:

They were. It was our whole salvation to do so.

10. To the tenth interrogatory he answers:

We did.

11. To the eleventh interrogatory he answers:

It had very much.

12. To the twelfth interrogatory he answers:

The moment we found that we gained on the leak, the order was given to stop throwing over the cargo. The vessel was not only eased, but saved by being thus lightened.

13. To the thirteenth interrogatory he answers:

She did not, not after the cargo had been cast away, and the leak gained on, so that she had some life in her.

14. To the fourteenth interrogatory he answers:

She was managed as skilfully and carefully as good officers and a first rate crew can manage a vessel. It was the management of the vessel and the spirit of the crew that saved us all.

15. To the fifteenth interrogatory he answers:

I know nothing at all about it of my own knowledge.

16. To the sixteenth interrogatory he answers:

I have already stated all that I know.

To the cross-interrogatories he answers as follows.

1. To the first cross-interrogatory he answers:

My full name is Thomas Vance. I am sixty-five years old. I have now no occupation. I have been a mechanic. I now live in Camden, New Jersey. I was born in Ireland. I have been in this country since August, 1820, thirty-five years ago, and am not a citizen of the United States.

2. To the second cross-interrogatory he answers:

I was one of the passengers of the brig; I am the father of the

master, John Vance. The mate's name was Howton, generally called Hooton, the second mate was named Holmes. The crew were Smith (Joseph Smith, now in New York), Michael Snee, Parker, and the rest I do not know. I do not know when we arrived at New Orleans; it was about a month after we sailed; I did not leave the brig at all after her arrival, except to go to sleep out of her, and upon further recollection, I think I slept on board of her; it was upon a previous voyage to New Orleans, in a different vessel, that I slept out of the vessel when she arrived there. After the vessel got into the thick water of the Mississippi she did not leak so badly, though she still continued to leak. The pumps were tried every two hours at least, and sometimes oftener. She generally made from eleven to fifteen inches an hour, as far as I can recollect, before she got to the Mississippi; after that she did not leak so badly; but I cannot state the precise difference in her leaking; she was pumped every two hours even after we got to that river.

3. To the third cross-interrogatory he answers:

There was, as I have already stated; it was between 10 and 11 o'clock P. M.; the Captain gave the orders after consultation with his officers, and nearly all the crew. He said nothing to me, that I recollect, but I heard him give the orders to lighten the ship by throwing over the cargo. Every male on board was pumping, or throwing over the cargo. The goods were cast over to save our lives; I knew that to be the reason before they were so thrown over; and I presume the Captain and mate, and every soul on board did. I do not know why the vessel leaked; it was below the deep water line; the cause I do not know; I cannot answer as to the strokes of the pumps, but it took incessant labor, much more before than after the jettison; the exact number I can't pretend to say. The hour the leak commenced was about 8 P. M.

4. To the fourth interrogatory he answers:

The brig was not coppered; it is not usual to do so the first voyage; I considered her a perfectly seaworthy vessel when she sailed, and I did not then know of any holes in her; since then, after she was docked, I saw holes in her; there was one main one, and perhaps smaller ones, but of these I cannot speak with accuracy. The main one had water flowing out of it when I saw it, for in order to find out the leak they bored an auger-hole in her to let the water in, then plugged it up, and then docked her, and the leak was detected by the water flowing out. I did not examine the hole, and do not, of my own knowledge, know anything as to the character, cause, or nature of this hole. I do not know whether it was or was not a worm-hole; but if it was, it is just one of those things that escape detection in the building, for it is often impossible to discover these worm-holes, from the manner in which the worms pack the dust behind them. The plane may go over it and it will be packed so tight that it cannot be discovered. In answer to the question whether I consider a

new brig seaworthy with one or more worm-holes in her hull, I can only say, that this vessel was considered perfectly seaworthy when she sailed, but if the leak which she sprang was exclusively or mainly attributable to worm-holes in her hull, previously undiscovered, I should suppose that she would not be seaworthy, but as evidence that she was considered seaworthy by the captain, as well as those who carefully examined her before she sailed, it must be said that he took his wife and children as well as myself on that voyage.

5. To the fifth interrogatory he answers:

I have already answered this as fully as I can.

6. To the sixth cross-interrogatory he answers:

I did not.

THOMAS VANCE.

Sworn and subscribed before me, this seventh day of April, A. D. 1855.

WILLIAM HENRY RAWLE,
Commissioner.

I, William Henry Rawle, the Commissioner named in the annexed commission, and also Commissioner for the State of Louisiana to take testimony in the State of Pennsylvania, do hereby certify that the deponents Michael Snee, Thomas J. Dohan, and Thomas Vance, were by me duly sworn to declare the truth upon the questions put to them in this cause; that the interrogatories and cross-interrogatories were produced to them, and their answers thereto taken in writing by me and subscribed by them respectively, in my presence, on the day and at the place in that behalf first aforesaid. In testimony whereof, I have hereunto set my hand and affixed my seal of office, this seventh day of April, Anno Domini one thousand eight hundred and fifty-five.

[SEAL.] WILLIAM HENRY RAWLE,
Commissioner.

Opinion.

Delivered by Hon. J. A. Campbell, 28th April, 1855.

This is an appeal from the District Court, in which the vessel was condemned to answer for a jettison of certain merchandise by the master, on a voyage from Philadelphia to New Orleans. The answer of the claimants in the District Court, was filed on the oath of the proctor, as an agent, that its facts were true to the best of his knowledge and belief.

No evidence was adduced to sustain the material averment, that the jettison was a measure necessary to the safety of the vessel and cargo, except the protest of the master and crew, extended on their arrival at New Orleans. The District Court properly excluded the

statements of the protest from his consideration as incompetent evidence, and consequently a decree was given for the libellants.

Since the appeal, two passengers and one of the crew have been examined. Their testimony is, that the vessel was in a good condition for several days after the commencement of the voyage, when she encountered heavy weather, in which the vessel was made to labor and strain, to ship water, and finally to leak rapidly. That all hands, including passengers, were put to work at the pumps; that the water in the hold increased rapidly; and with the prospect of her loss, the orders to lighten the ship were given after a consultation between the captain and mates. This evidence does not come from the most legitimate source. The shipper is entitled to the examination of the master and mates, by whose orders and under whose responsibility the loss of his property was occasioned. The Court disapproves the practice of allowing an answer, except from an interested party having a knowledge of the facts, where there is such an one connected with the case, and also to any intervention by a proctor in a cause, except in a way strictly professional. The passengers aboard a vessel rarely have the knowledge to appreciate the extent or imminence of a danger, nor are able to pronounce upon the means proper for the safety of a vessel. Their apprehensions usually exaggerate the circumstances of peril, and the efforts for their relief.

The Court finds in this evidence, facts that show a case of peril. The witnesses may be trusted for the facts, that all hands were placed at the pumps, and that the hold of the vessel was rapidly filling with water, when the orders to lighten the ship were given. The Court, with some hesitation, has come to the conclusion, that the jettison was authorized.

The testimony shows also, that the necessity was not superinduced materially by the worm-holes, which were discovered in the keel on the arrival of the vessel in port. The pumps were described to be in a proper state, and their power was sufficient to overcome any danger from that source.

Nor is the fact, that the master failed to exert himself to adjust the general average account, and surrendered the cargo without exacting a bond for contribution, a reply to this defence.

No claim is made in the libel against the master for damages on this account, and conceding there was a neglect of duty on his part, for which a liability arises, it does not extend to the value of the goods sacrificed.

The libellants have a claim for contribution from the other shippers and owners, which is not affected by the laches of the master. A claim which may be enforced either at law against the parties severally, or in equity against the whole. Adams' Eq. 270–1; Abb. Ship. 508.

My conclusion is, that the claimants have sustained their answer; but under the circumstances they cannot be allowed costs. Decree reversed. Each party to pay his own costs.

Decree.

April Term, 1855. New Orleans, Saturday, 28th April, 1855. Court met pursuant to adjournment. Present, Hon. J. A. Campbell, Presiding Judge.

E. I. DUPONT DE NEMOURS & Co., Appellees,
v.
Brig "ANN ELIZABETH,"
JOHN VANCE & als., Claimants.
} No. 2390.

This cause came on to be heard at this term, on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof it is now ordered, adjudged, and decreed, that the decree of the District Court be reversed, that the libel herein be dismissed, and that each party pay his own costs.

Decree rendered 25th April, 1855.
" signed 5th May, 1855.

J. A. CAMPBELL,
Associate Justice of the Supreme Court of the United States.

Order of Appeal.

April Term, 1855. New Orleans, Wednesday, 2d May, A. D. 1855. Court met pursuant to adjournment. Present, Hon. J. A. Campbell, Presiding Judge.

E. I. DUPONT DE NEMOURS & Co.
v.
Brig "ANN ELIZABETH,"
JOHN VANCE & als., Claimants.
} No. 2390.

On motion of Durant and Horner, proctors for libellants, and on showing to the Court that the libellants think there is error to their prejudice in the decree herein rendered on the 28th of April, 1855, and desire to appeal suspensively therefrom, it is ordered that an appeal be allowed, and that the same operate as a supersedeas returnable to the next term of the Supreme Court of the United States, upon libellants giving bond conditioned according to law, in the penal sum of five hundred dollars, with good and solvent security thereon.

Appeal Bond.

Filed 2 May, 1855.

Know all men by these presents, that we, E. I. Dupont de Nemours & Co. as principals, and Philip Rotchford as surety, are held and firmly bound, jointly and severally, unto John Vance, Martin Thompson, Calvin Taggart, John T. Gause, C. Ogden, McDonald and Laughlin, claimants of the Brig "Ann Elizabeth," in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said claimants of the Brig "Ann Elizabeth," their heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the first day of May, in the year of our Lord eighteen hundred and fifty-five.

Whereas, E. I. Dupont de Nemours & Co. have this day presented a petition to the Honorable the Circuit Court of the United States for the Fifth Circuit Court, holding sessions in and for the Eastern District of Louisiana, praying for an appeal to the Supreme Court of the United States, from a judgment of the said Circuit Court of the United States for the Eastern District of Louisiana, rendered on the 28th April, 1855, on an appeal from the District Court of the United States for the Eastern District of Louisiana, dismissing the libel of E. I. Dupont de Nemours & Co., each party to pay costs, against the Brig "Ann Elizabeth." Now the condition of the above obligation is, that the above-bounden E. I. Dupont de Nemours & Co., shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate real or personal, if they be cast in the appeal; otherwise that the said Philip Rotchford, their surety, shall be liable in their place.

[SEAL.] E. I. DUPONT DE NEMOURS & CO.,
By their attorneys, DURANT & HORNER. [SEAL.]
P. ROTCHFORD. [SEAL.]

Signed, sealed, and delivered in the presence of
CHARLES W. HORNER.

Approved. J. A. CAMPBELL,
Associate Justice.

United States of America. Circuit Court of the United States.
Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, John W. Gurley, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do